Supreme Court, U.S.
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No. 98-942

In The

Supreme Court of the United States

October Term, 1998

WILLIAM FIORE,

v. *Petitioner,*

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME II, PAGES 169 TO 337

JAMES B. LIEBER*
M. JEAN CLICKNER
APRIL L. BOYER
LIEBER & HAMMER, P.C.
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

HAROLD GONDELMAN
PLOWMAN SPIEGEL & LEWIS, P.C.
310 Grant Street
Pittsburgh, PA 15219-2204
(412) 263-1833

Counsel for Petitioner

ROBERT A. GRACI*
ANDREA F. MCKENNA
Office of Attorney General
16th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 787-6348

Counsel for Respondents

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

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I. INTRODUCTION

William Fiore owned and operated a hazardous waste facility in western Pennsylvania under permit from the state's Department of Environmental Resources ("DER"). He, together with his employee Dave Scarpone, was charged with various criminal counts, including the operation of a hazardous waste disposal facility *without a permit* in violation of the Solid Waste Management Act (SWMA), 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony. At a joint trial both defendants were convicted. Mr. Fiore was sentenced to a total of five to ten years in prison, fined $200,000.00 and placed on probation for twenty-five years. Each co-defendant appealed to the Superior Court of Pennsylvania. On its own motion the Superior Court transferred the appeals to the Commonwealth Court. On Mr. Fiore's motion, the Commonwealth Court transferred his appeal back to the Superior Court, but retained the Scarpone appeal.

Mr. Scarpone's appeal was decided by the Commonwealth Court in a reported case at *Commonwealth v. Scarpone*, 596 A.2d 892 (Pa. Commw. 1991), aff d 634 A.2d 1109 (Pa. 1993) (Ex. 1 and 2). The Commonwealth Court held that since Mr. Fiore had a permit to operate the facility, his employee Mr. Scarpone could not be convicted of operating a waste disposal facility *without a permit;* Mr. Scarpone's conviction was reversed.

Mr. Fiore's appeal to the Superior Court resulted in an affirmance of the conviction in an unpublished Memorandum opinion, *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989).

The Commonwealth appealed the Commonwealth Court's decision in *Scarpone* to the Supreme Court of Pennsylvania. Petitioner appealed the Superior Court's decision.

The Supreme Court granted the Commonwealth's petition for allocatur in the *Scarpone* appeal. Mr. Fiore filed a petition to the Supreme Court, at No. 9 W.D. Misc. Dkt. 1992 (Ex. 3), to take jurisdiction of his case and consolidate it with the *Scarpone* appeal so as to avoid conflicting results. That application was denied on March 25, 1992. (Ex. 19)

The Supreme Court granted the Commonwealth's petition for allocatur in *Scarpone* so as to resolve the conflicting decisions between the Superior and Commonwealth Courts. The Court recognized the identity of the situations in *Scarpone* and *Fiore* when, in its opinion affirming the Commonwealth Court reversal of Mr. Scarpone's conviction, the Supreme Court held:

> The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations. We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put Mr. Scarpone did have a permit.

Commonwealth v. Scarpone, 634 A.2d 1109 (Pa. 1993). It bears repeating that the permit which Mr. Scarpone had was the permit of his employer, William Fiore.

The Supreme Court determined that the Commonwealth had not made out the crime of operating a waste

disposal facility without a permit. It stated, "Simply put, Mr. Scarpone *did have a permit.*" (emphasis supplied)

The Supreme Court noted that a more appropriate charge against Scarpone and Mr. Fiore could have been brought under alternative provisions of the statute. That is, Mr. Fiore and/or Mr. Scarpone were alleged to have hired a welder to alter the direction of the flow of various hazardous waste material from the dump, which was contrary to the terms of the permit. Such conduct could have been charged under 35 P.S. § 6018.606(g) of the SWMA which makes it a first degree felony for any person to "intentionally, knowingly or recklessly restore, transport, treat, or dispose of hazardous waste within the Commonwealth in violation of any provision of the act, and whose acts or omissions cause pollution, a public nuisance or bodily injury to any person. The Court reasoned, however, that

> the alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility *without a permit* is a bald fiction we cannot endorse. Penal provisions of the statute must be strictly construed under 1 P. S. § 1928(b)(1). (emphasis in original)

Scarpone, 634 A.2d at 1112. Refusing to condone the "bald fiction", the Supreme Court affirmed the Commonwealth Court's reversal of Mr. Scarpone's conviction.

Thereafter Mr. Fiore filed an Emergency Application for Extraordinary Relief to the Supreme Court of Pennsylvania, at No. 7 W.D. Misc. Dkt. 1994, by which he requested the Court exercise its extraordinary King's

Bench powers, and give him the benefit of the Court's decision in *Scarpone*. That application was denied. (Ex. 19)

Mr. Fiore then filed a motion for post-conviction collateral relief with the trial court (Ex. 5). Mr. Fiore again requested that the Supreme Court's *Scarpone* decision be applied to him. The trial court denied the motion for post-conviction collateral relief and its decision was affirmed by the Superior Court. *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995) (Ex. 6).

The post-conviction court even admitted that Mr. Fiore was incarcerated on facts that, at the time of the post-conviction decision, did not constitute criminal activity. However, the post-conviction court refused to give retroactive application to the Supreme Court's *Scarpone* decision.

Mr. Fiore is presently incarcerated in the State Correctional Institution at Pittsburgh, Pennsylvania on a five to ten year sentence for committing acts which the Supreme Court of Pennsylvania, under identical facts, has specifically held were never criminal under the penal provisions charged.

II. LEGAL ISSUES RAISED

This case raises two related issues. The first is whether Mr. Fiore was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged. The second issue is whether the Pennsylvania Courts have denied Petitioner William Fiore due process and equal rights by refusing to grant him benefit of the Pennsylvania Supreme Court's

decision in *Scarpone*. That is, by refusing to give retroactive effect to that decision, Petitioner Fiore is serving and has served years incarcerated on the basis of facts which do not constitute the crime for which he was convicted.

III. FACTUAL BACKGROUND

The relevant facts presented are not in dispute. The essence of the charges against Mr. Fiore and Mr. Scarpone were that they criminally operated a hazardous waste facility without a permit.

During the jury's deliberations, the jury sent a question to the judge as follows: "By law, does a permit violation automatically revocate or suspend that permit, or must it be worded so in the permit?" (Ex. 18)

The Court entertained argument from counsel for the Commonwealth and both co-defendants about the proper response to the jury's question. Petitioner's counsel suggested that the proper answer to both parts of the jury's question was "no", because pursuant to the Pennsylvania Administrative Code, § 1917(a) and 1921(a), no environmental permit can be revoked, suspended or modified without affording the permittee an opportunity to appeal such revocations, suspension or modification to the Environmental Hearing Board. The Commonwealth's counsel argued that a permit is granted for a specific activity and if the permittee alters that activity so as to commit conduct which is "clearly beyond the pale of the four corners of the permit", then there is "no permit." Upon considering the argument of all counsel, the Court instructed the jury as follows:

THE COURT: Ladies and Gentlemen of the Jury: Your question is an indication to counsel and the court of the diligence with which you apply yourself to your responsibility. Your question focuses on a very intricate legal issue which is involved in this case, and we are not surprised that you focused on that issue in view of your application to your responsibility.

Your question is in two parts. The first part asks, "By law, does a permit violation automatically revocate or suspend that permit?" The answer to that question is no. The second part of the question is: "or must it be worded so in the permit?" The answer to that question is that it is not necessary that a permit as a matter of law specify all the ways in which it may be violated and thereby revoked. It does not have to specify the ways in which it may be violated or revoked.

In order to help you understand the allegations, I would like to amplify those answers.

Clearly, the MIDC facility had a permit to operate a hazardous waste facility. You know that's been made clear during the course of the case. And, as a matter of law, every violation of the conditions of that permit would not result. There is a way in which violations are handled. In fact, you heard testimony with regard to violations and the way those violations were handled.

The allegations in this case are that Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an

unpermitted operation of a hazardous waste facility.

The question of fact for you to decide is, on what testimony will you hang your hat. In other words, whom you believe and whom you do not believe.

Secondly, was the violation or the alteration so substantial as part of the condition of the permit that the operation of the facility thereafter was an operation of a facility without a permit?

These are questions of fact for you to answer.

I hope that gives you some better understanding of the law and will help you reach a verdict in this matter.

You may return to deliberate.

Thereafter, the jury returned with a verdict of guilty as to both Mr. Fiore and Mr. Scarpone on the counts. Mr. Fiore was sentenced as set forth above.

IV. PROCEDURAL HISTORY

1. Petitioner charged in criminal information with, *inter alia*, two counts of violating the Solid Waste Management Act ("SWMA") and Clean Streams Law, in violation of 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony.

2. Petitioner was convicted of, *inter alia*, the following charges and, on April 10, 1987, was sentenced as follows:

> Count 1, Trial 1 (violating § 6018.401(a)): two and one half years to five years imprisonment, ten years probation, and a fine of $100,000; and,

> Count 2, Trial 2 (violating § 6018.401(a)): two and one half to five years imprisonment and ten years probation, to run consecutive to the sentence imposed at Count 1, and a fine of $100,000.

3. Co-defendant Scarpone was convicted and sentenced on the same charges.

4. Petitioner appealed the sentence to the Superior Court of Pennsylvania (Ex. 7).

5. Mr. Scarpone appealed the conviction and sentence to the Commonwealth Court.

6. The Superior court *sua sponte* transferred appeal of Mr. Fiore to Commonwealth Court. (Ex. 20)

7. The appeal of Mr. Fiore was transferred back to Superior Court. (Ex. 20)

8. Mr. Fiore's appeal to Superior Court resulted in an affirmance of the conviction in an unpublished Memorandum opinion, *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989) (unpublished). (Ex. 5)

9. Mr. Fiore petitioned the Supreme Court of Pennsylvania for allowance of appeal, which was denied on March 13, 1990 at No. 310 W.D. Allocatur Docket, 1989. (Ex. 8 and 19) This concluded Mr. Fiore's direct appeal.

10. On August 5, 1991, the Commonwealth Court reversed Mr. Scarpone's conviction, reasoning that the facility did not operate without a permit. *Scarpone v. Commonwealth*, 596 A.2d 892 (Pa. Commw. 1991), aff'd, 634 A.2d 1109 (Pa. 1993).

11. The Supreme Court granted the Commonwealth's petition for allocatur in *Scarpone*.

12. Mr. Fiore filed an Application for Extraordinary Relief to the Supreme Court to take jurisdiction of his case and consolidate it with the Scarpone appeal so as to avoid conflicting results. In that petition, Mr. Fiore pointed out the unfair result inherent in diametrically opposed decisions reached by the Commonwealth and Superior Courts. That application was denied on March 25, 1992 at No. 9 W.D. Misc. Dkt. 1992, thus letting stand the Superior Court's affirmance of Mr. Fiore's conviction. (Ex. 10)

13. In an opinion filed December 15, 1993, Supreme Court affirmed the Commonwealth Court's reversal of Mr. Scarpone's conviction, reported at *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). (Ex. 2)

14. January 27, 1994, Mr. Fiore again attempted to raise the issue of his fundamentally unfair treatment by filing a second "Emergency Petition for Extraordinary Relief" to the Supreme Court of Pennsylvania at 7 W.D. Misc. Dkt. 1994. (Ex. 4) Therein Mr. Fiore urged the Court to review this anomalous situation.

He argued, *inter alia*, that: "Under its King's Bench powers, this Court 'upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, [may] assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done. 42 Pa.C.S.A. § 726.' " The Supreme Court denied Mr. Fiore's petition on March 22, 1994. (Ex. 11)

15. On March 28, 1994, Mr. Fiore filed a Petition for Post Conviction Collateral Relief with the Court of Common Pleas of Allegheny County. (Ex. 12) Therein he again pointed out the anomalous factual situation of this case and urged the Court to vacate his conviction and sentence on the counts of operating a facility without a permit.

On or about August 18, 1994, the Court of Common Pleas denied Mr. Fiore's post conviction petition. In its opinion, the trial court stated:

> Counsel argued correctly that Fiore is currently serving a sentence for a conviction based upon evidence which today would no longer support a conviction in Pennsylvania. (Ex. 13)

16. In denying Plaintiff's Petition for Post Conviction Relief, the Court determined that his conviction was appropriate under the law in effect at the time of the conviction. Further, the Court concluded that the Supreme Court's later decision in the *Scarpone* matter did not change that fact and was not grounds for relief under Pennsylvania's Post Conviction Relief Act found at 42 Pa.C.S.A. § 9442.

17. On or about August 29, 1994, Petitioner filed a direct appeal to the Commonwealth Court from the Court's denial of his Petition for Post Conviction Relief by Order dated August 18, 1994. The Commonwealth Court transferred the case to the Superior Court on the Commonwealth's motion. (Ex. 14 and 15)

In that appeal, Petitioner raised the following issues:

I. A writ of error coram nobis lies to vacate sentences which Fiore is currently serving

of five to ten years where the court below in denying post-conviction relief admitted that Fiore is serving a sentence for a conviction based upon evidence which today would no longer support a conviction in Pennsylvania.

II. The employer is denied equal protection of the laws by the courts where Fiore's co-defendant/employee has been exonerated by the Commonwealth Court and Supreme Court of Pennsylvania from violating the law in operating a new hazardous waste facility without a permit because Fiore, the employer, in fact had a permit.

III. Fiore has been denied due process of law where the trial court and this Court, as well as the Attorney General of the Commonwealth of Pennsylvania, erroneously construed the environment protection laws to charge a crime which under the legislative scheme of things never constituted a crime.

IV. Fiore is being subjected to cruel and unusual punishment where he is serving a five to ten year sentence and is subject to $200,000.00 in fines as well as costs of prosecution and a 25-year probation for acts which never constituted a crime under the statutory scheme of things.

The Superior Court denied this appeal at *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa.Super. 1995) (filed September 20, 1995). (Ex. 6)

18. On or about October 18, 1994, petitioner filed another "Emergency Application for Extraordinary Relief, or, in the alternative, a Petition for Review" at 107

W.D. Misc. Docket 1994 (Ex. 16), wherein petitioner again urged the Supreme Court of Pennsylvania to invoke its King's Bench powers and to set aside Mr. Fiore's conviction on the disputed count. By that petition, petitioner revived his contention that he was being unfairly incarcerated under facts and law which the Supreme Court of Pennsylvania had concluded did not constitute a crime.

Although Mr. Fiore, through counsel, did everything to try to avoid the incongruous result that presently exists, he is still placed in the position of having to proceed by way of Writ of Habeas Corpus in the federal courts to seek justice and vindication of his right to due process and to be treated fairly in this matter. That Mr. Fiore's actions did *not* constitute a crime, has been specifically and clearly decided by the Supreme Court of Pennsylvania.

V. DISCUSSION

A state prisoner is entitled to federal habeas relief if he is being held "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2254(a) Petitioner Fiore's conviction and incarceration run afoul of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution in that he is currently incarcerated on the basis of facts which the Supreme Court of Pennsylvania has ruled does not constitute a crime under the Pennsylvania Crimes Code.

Mr. Fiore is confined at the State Penitentiary under a sentence of 5 to 10 years, $200,000.00 in fines, costs, and

25 years probation for committing acts which the highest court of Pennsylvania found did not constitute a crime under the sections charged of the Solid Waste Management Act.

A. DENIAL OF DUE PROCESS AND EQUAL PROTECTION

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to **any person** within its jurisdiction the equal protection of the laws." (emphasis supplied). As the Supreme Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S. Ct. 836, 846 (1948). At bottom, the Equal Protection Clause guarantees that local, state and the federal governments treat similarly situated persons similarly; it restrains arbitrary governmental classifications which lead to invidious discrimination. *See Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985). The constitutional prohibition extends both to statutes which, on their faces, draw discriminatory classifications, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879), and to statutes which, when applied, lead to discriminatory classifications. *See Yick Wo. v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S. Ct. 2941 (1979).

Not all differential treatments by government are proscribed; nor are all government-made classifications

or differential-treatments reviewed under the same standard. Statutes or actions which purposefully impair a fundamental right or deal with a "suspect classification," are subject to "strict scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973). Under this standard of review, the government-made classification or treatment is upheld only if it is found to be necessary to obtain a compelling government objective. Few government-made classifications pass this rigorous test. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972).

In the absence of either purposeful impairment of a fundamental right or suspect classification, a less rigorous standard of review is applied. This standard of review is often referred to as the "mere rationality" standard. *See Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337 (1911). When this standard is applied, the judicial inquiry is limited to ascertaining whether the classification in issue bears a rational relation to a permissible governmental objective. *See Cleburne, Texas*, 473 U.S. 432, 105 S. Ct. 3249; *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 105 S. Ct. 1676 (1985); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337 (1911) (law will be stricken only if "purely arbitrary").

Involved here is impairment of Petitioner's fundamentally protected right to liberty.[1] Accordingly, the

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[1] The concept that personal liberty is a fundamental protected right underlies the basic reasoning for the federal habeas statute. In *Lehman v. Lycoming County Children's Services*, 648 F.2d 135 (3d Cir. 1981), the Court recognized that the primary purpose of federal habeas proceedings is to protect a

Commonwealth must establish a compelling reason for its refusal to treat Petitioner similarly to Mr. Scarpone.

The touchstone of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct 2963, 2975 (1974). It is required that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983). A penal statute "must give reasonable notice of the conduct which it proscribes to a person charged with violating its interdiction." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976).

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citizen's fundamental right to be free of being wrongfully held in custody. It is the allegation of an unlawful restriction on personal liberties which compels the court to review an otherwise final decision; that is improper restrictions on personal liberties outweigh the otherwise compelling interest in the finality of litigation. *Id.* at 139.

As Justice Brennan wrote for the Supreme Court majority in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963):

> Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Id. at 424, 83 S.Ct. at 841.

The strength of the protected nature of individual freedom is such that courts even recognize that an individual on parole may be considered "in custody" for purposes of the habeas statute. *See Carafas v. La Vallee*, 391 U.S. 234, 242, 88 S.Ct. 1556, 1561 (1988) (referencing *Jones v. Cunningham*, 371 U.S. 236, 83 S.Ct. 373 (1963)).

The facts as set forth clearly establish that Mr. Fiore has been treated dissimilarly from Mr. Scarpone, based on the evidence and law, and that the commonwealth has no compelling reason for this difference. Mr. Fiore petitioned the Supreme Court of Pennsylvania to exercise its extraordinary powers, no less than three times, so as to afford him treatment equal to that given Mr. Scarpone.

Case law, as set forth below, supports Petitioner's contention that he has been denied due process and equal protection of the law of Pennsylvania. In *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), the Court was faced with a factual situation similar to the one at bar in which on a writ of *coram nobis;* it was asked retroactively to apply a Supreme Court decision to a prior conviction. In deciding to grant the writ, the *Travers* Court looked to its earlier decision in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971) and determined that its decision was based on "the simple and universal rule that a judgement in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law" and that this is "the worst type of fundamental unfairness," requiring the invalidation of the convictions that had become final. *Liguori*, 438 F-2d at 669.

Similarly, in *Davis v. United States*, 417 U.S. 333, 94 S.Ct 2298 (1974), the Court stated that if the habeas petitioner's contentions were true then his "conviction and punishment [were] for an act that the law [did] not make criminal," there could be no room for doubt that such a

circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances that justify collateral relief under [the habeas statute]." *Davis*, 417 U.S. at 346, 94 S.Ct. at 2305.

In *Davis* the petitioner was prosecuted and convicted for failure to report for military induction. In that case, the selective service board had declared him a delinquent and ordered the petitioner to report for induction, even though he had not been found acceptable for military service prior to that time. On direct appeal, the petitioner challenged the local board's application of various military regulations by which they ordered him to report for induction prior to having been found acceptable for service in the Armed Forces. While that appeal was pending, the Supreme Court of the United States announced its decision in *Gutknecht v. United States*, 396 U.S. 295, 90 S.Ct. 506 (1970), wherein it concluded that selective service regulations that accelerated the induction of delinquent registrants were punitive in nature and without legislative sanction. Accordingly, the appeals court remanded Davis's case back to the trial court for further review based on *Gutknecht*. Thereafter, the trial court determined that Davis's induction had not been accelerated because of his delinquency status.

While Davis's second appeal was pending, the Ninth Circuit decided *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), which had facts virtually identical to those in *Davis*, including the trial court's decision that Fox's induction order was not accelerated by the duration of delinquency. On appeal, the Ninth Circuit reversed Fox's conviction on the authority of *Gutknecht*. The court of

appeals affirmed Davis's conviction and he commenced serving his sentence.

Davis subsequently filed a *habeas corpus* action in which he asserted that the *Fox* case had effected a change in the law and that its holding required that his conviction be set aside. The court of appeals determined that its decision on direct appeal was the law of the case and that its intervening decision in *Fox* would not be applied in a collateral attack on Davis's conviction. The Supreme Court granted certiorari and ruled that Davis could raise this issue by way of collateral attack, even though it was a matter of statutory construction, because the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and presented "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Davis*, 417 U.S. at 346, 94 S.Ct. at 2305 (citation omitted).

Finally, based on the facts in *Davis*, which are essentially the same as in the instant case, the Supreme Court concluded:

> In this case, the petitioner's contention is that the decision in *Gutknecht v. United States*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* case after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis's conviction and punishment are for an act that the law does not make criminal. There can be no

> room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255.

417 U.S. at 346-47, 94 S.Ct. at 2305 (internal citations omitted).

Here, as in *Davis*, Petitioner Fiore is incarcerated for actions that are not criminal, as determined by the highest court of Pennsylvania. This situation clearly constitutes an egregious miscarriage of justice, which violates Petitioner's rights to due process and the equal application of the law. Further, it constitutes a situation cognizable under the habeas corpus statute.

B. EXHAUSTION

A habeas petitioner bears the burden of proving that he has exhausted available state remedies. *Santana v. Fenton*, 685 F.2d 71, 73 (3d Cir. 1982). To demonstrate compliance, the petitioner must show that the claim he asserts in federal court has been "fairly presented" to the state courts. *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971); *Ross v. Petsock*, 868 F.2d 639, 641 (3d Cir. 1989). To be "fairly presented," the federal claim must be the substantial equivalent of that presented to the state courts. *Picard*, 404 U.S. at 278, 92 S.Ct. at 513; *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3d Cir. 1986). *See, generally, Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1990).

As previously set forth, Petitioner diligently petitioned the courts of Pennsylvania to grant him the benefit of the Supreme Court's decision in *Scarpone*. Mr. Fiore has

exhausted all factual and legal issues raised herein in previous proceedings before the Pennsylvania Courts, including the Pennsylvania Supreme Court.

During the post-conviction proceedings the Commonwealth argued that Mr. Fiore waived his unequal treatment claim, but the facts do not support that contention. In state court proceedings, the Commonwealth contended that the issue Mr. Fiore raised on direct appeal, stated as an insufficiency of the evidence argument, was not the same argument made by Mr. Scarpone on direct appeal. Mr. Scarpone's direct appeal was stated in terms of the Commonwealth's failure to follow administrative procedure to revoke the permit.

To the extent the Commonwealth will raise this contention again, here, Petitioner suggests that this is a distinction without a difference. In fact, the Pennsylvania Supreme Court disregarded this difference in approach, and granted allocatur precisely because of the existence of two opposing decisions by the intermediate appellate courts. (Ex. 2)

In its habeas decision, the Court of Common Pleas disregarded the Commonwealth's attempted detour, and determined that Petitioner had previously litigated the issue of unfair and unequal application of the law and, thus, the issue was not waived. The post-conviction court's ruling which denied petitioner retroactive application of the Supreme Court's *Scarpone* decision was based entirely on the conclusion that Petitioner had no right to the benefit of a "new rule of law in any matter on collateral review unless the decision was handed down

during the pendency of the [petitioner's] direct appeal." (Ex. 13)

In denying Petitioner's appeal from the post-conviction court, the Superior Court noted that Petitioner, there appellant, had litigated (exhausted) the primary issue raised in his post-conviction petition, that he was unfairly convicted and sentenced for conduct which did not constitute a crime. (Ex. 15)

Petitioner's primary contention here is two-fold: first, Petitioner is being held incarcerated for conduct which was not criminal under the statutory section charged; second, that he has been denied constitutional procedural and substantive due process rights and the right to equal protection by the courts of Pennsylvania when they denied him retroactive benefit of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*.

The procedural record, as previously set forth, is clear that Petitioner has taken every conceivable step to raise and preserve this issue, both by way of Application for Extraordinary Relief to the Supreme Court of Pennsylvania, and again by a post conviction petition, the denial of which Petitioner appealed.

C. RETROACTIVE APPLICATION OF SCARPONE DECISION

The principal of nonretroactivity prevents a federal court from granting collateral relief to a state prisoner based on a new rule of law announced after the prisoner's conviction and sentence became final. *See, e.g., Caspari v. Bohlen*, ___ U.S. ___, 114 S.Ct. 948, 953 (1994)

(citing *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 1139 (1992)).

In 1989, the Supreme Court decided *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), in which it clarified how the question of retroactivity should be resolved for cases on collateral review. *Teague* involved a collateral challenge to the conviction of a black defendant by an all-white Illinois jury after the prosecutor used his ten peremptory challenges to strike blacks from the jury. Petitioner filed a writ of habeas corpus and asked the Court to extend the Sixth Amendment's fair cross-section requirement to petit juries. A plurality of the Court refused to reach the merits, holding that new rules of law should not be applied retroactively on collateral review. "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S.Ct. at 1075 (footnote onitted).

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070. Thus to determine whether a ruling is "new," this Court must "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the constitution." *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260 (1990).

It can be argued that this Court need not deal with the issue of retroactivity, because Mr. Fiore and his Co-

defendant were simultaneously tried on the same facts, to the same jury, which addressed the same question. However, if this Court does apply a retroactivity analysis, it must first determine if Petitioner is seeking the application of "new" rule. Even if the Court determines that the petitioner seeks the benefit of a new rule, the Court must decide whether that rule falls within one of the two narrow exceptions to the non-retroactivity principle. *See, Gilmore v. Taylor,* 508 U.S. 333, 113 S.Ct. 2112, 2113 (1993).

The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane,* 489 U.S. at 307, 109 S.Ct. at 1073 (plurality opinion) (internal quotation marks omitted). The second exception permits the retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *See, Saffle v. Parks,* 494 U.S. at 495, 110 S.Ct. at 1264. This second exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *United States ex rel. Cannon v. Johnson,* 396 F.Supp. 1362, 1364 (E.D. Pa. 1975), aff'd, 536 F.2d 1013 (3d Cir. 1976).

In determining whether the Supreme Court in *Scarpone* had issued a "new rule of law," we begin an analysis by review of that decision. The Court's succinct opinion makes no reference to earlier decisional law contrary to its conclusion. Rather, the decision is simply based on the black letter principal that penal statutes must be strictly construed. The *Scarpone* decision is one of straight forward statutory construction; in no way does it revise or reverse previous case law, nor has the Commonwealth

posited such an argument. Moreover, this principal *itself* is embraced by statute. *See* 1 Pa. Cons. Stat. § 1928(b)(1).

Further, a review of Pennsylvania case law reveals no decisions upon which the Commonwealth could reasonably have relied in prosecuting Mr. Fiore under its interpretation of the law. The obvious result reached by state Supreme Court was first reached by the Commonwealth Court.

The Pennsylvania Supreme Court's decision in *Scarpone* did not establish a "new" rule of law, but rather only interpreted an existing statute. This construction is supported by decisions of the United States Supreme Court. For example, in *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875 (1987), the Supreme Court considered the scope of the mail fraud statute, 18 U.S.C. § 1341, which prohibits the use of mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The Court held that the mail fraud statute applied only to schemes to defraud others of money or property rights; it did not proscribe schemes to defraud citizens of an intangible right to honest and impartial government.[2]

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[2] Petitioners in *McNally* had been charged with devising a scheme to defraud the citizens of Kentucky of their intangible right to have the state's affairs conducted honestly, and to obtain money by means of false pretenses and the concealment of material facts. The jury was instructed to convict if it found either of two schemes to exist. One scheme involved a deprivation of property rights, but the other involved only the deprivation of the intangible right to good government. The Supreme Court reversed the Petitioners' convictions because

Subsequent to the Supreme Court's decision, various petitions for writ of habeas corpus were filed by individuals previously convicted under the same statute on the basis of "intangible rights." In *United States v. Lovett*, ___ F. Supp. ___ (No. 87-C-8978) (85 CR 284 1988) (Ex. 17), the habeas corpus petitioner had been convicted on two counts of mail fraud and moved, pursuant to the federal habeas statute, to vacate his conviction and sentence. The basis of his petition was the Supreme Court's *McNally* decision which had been decided subsequent to Lovett's conviction, sentencing and direct appeals.

In responding to the government's argument that the *McNally* decision should not be applied retroactively, the *Lovett* court noted that in *McNally*, the jury instructions allowed a conviction for conduct that was outside the scope of the mail fraud statute. Thus, the Court concluded, the *McNally* decision did not state a new theory of law. Rather, it merely interpreted the law in a way consistent with the terms of the statute.

Other courts have collaterally set aside mail fraud convictions, based on the retroactive application of *McNally*. *See, United States v. Wade*, 672 F.Supp. 864, 875 n.5 (D.Md. 1987). The *Wade* court's reasoning in granting retroactive effect of the *McNally* decision is particularly *apropos:*

> It is entirely settled that there is no federal common law of crimes. That is, criminal conduct does not offend against the federal government unless it violates an Act of Congress. "One may

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the jury had not been required to find that the state was defrauded of any money or property in order to convict.

> be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." The federal judiciary therefore "may not create crimes outright or enlarge the reach of enacted crimes." As the Supreme Court stated in *Viereck*, 318 U.S. at 243, "the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction os [sic] as to punish one not otherwise within its reach, however deserving his conduct may seem." In plain English, if petitioners' conduct was not prohibited by [the mail fraud statute], it was not a federal crime.

United States v. Mandel, 672 F. Supp. 864, 873-874 (D.Md. 1987) (citations omitted). Likewise, in Pennsylvania, the courts may not create crimes, but rather are confined to a strict construction of the Criminal Code. *See*, 1 Pa. Cons. Stat. § 1928(b)(1); *Commonwealth v. Scarponè*, 634 A.2d 1109, 1112 (Pa. 1993) (penal provisions of a statute must be strictly construed).

Similarly in the instant case, the Pennsylvania Supreme Court's decision that Mr. Scarpone's [and Fiore's] conduct did not constitute a violation of the criminal charge imposed does not constitute a new rule of law.

The general rule against the retroactive effect of a "new" statement of law generally involves cases where the court establishes new criminal due process rights and/or procedures, such as in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), and *Miranda v. Arizona*, 384 U.S. 436,

86 S.Ct. 1602 (1966).[3] As is apparent, those two decisions drastically changed the face of criminal procedures. The commonly stated reason for denying retroactive effect to such decisions is that prosecutors should be permitted to rely on existing law at the time of trial. Such changes in procedural rules are retroactively applied only if they affect the truth-finding process. Here, however, the Pennsylvania Supreme Court's ruling the [sic] *Scarpone* simply decided which of two conflicting intermediate appellate court rulings, interpreting a discrete statute, was correct, and critically what are the actual elements of the offense.

The Commonwealth cannot argue that it was surprised by the Supreme Court's decision. Indeed the very issue underlying this entire scenario, that is whether the permit was repudiated by Mr. Fiore's and Mr. Scarpone's actions, was raised during the course of the trial when the Judge was asked to clarify the instructions to the jury.

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[3] A review of the key federal cases in this area reveal the courts have systematically denied retroactive application of new criminal procedural rulings. In *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965), the Court refused to apply the Fourth Amendment exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), retroactively. In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct 1967 (1967), the Court held that the right to counsel at line-ups afforded in *Wade v. United States*, 388 U.S. 218, 87 S.Ct. 1926 (1967), was applicable only to line-ups occurring after the date of the *Wade* decision. In *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969), accorded only prospective application to *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), which excluded limits of non-authorized electronic surveillance. Informed consent rule in *Miranda v. Arizona*, not applied retroactively, *see Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966).

If this Court determines that *Scarpone* was a "new rule" then, Petitioner contends, this case falls within the first exception to the non-retroactivity rule. That is, the *Scarpone* decision determined that Mr. Fiore's primary conduct was beyond criminal sanction and, thus, he is entitled to benefit of that decision.

This exception to the non-retroactivity rule was fully explained in *Mackey v. United States*, 401 U.S. 667, 675, 91 S.Ct. 1160, 1171 (1971), wherein the Court first explained that nonretroactivity, as a general rule, applied to new " 'procedural due process' rules, that is, those applications of the constitution that forbid the government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior." *Id.* at 692, 91 S.Ct. at 1180. However, the *Williams* court explained,

> new "substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing. As I noted above, the Writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial I have described above [including the prosecutor's reliance in established law]. Thus, the obvious interest in

> freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus.

401 U.S. at 693, 91 S.Ct. at 1180 (footnotes omitted).

Mackey referred to that Court's earlier decision *United States v. United States Coin & Currency*, 401 U.S. 715, 91 S.Ct. 1041 (1971), in support of this quotation. In *United States Coin & Currency*, the Supreme Court ruled that its earlier decisions that a gambler who was charged with criminal liability for failing to file tax papers could raise a Fifth Amendment defense against self-incrimination. In determining that those earlier cases should be given retroactive effect, the Court noted that they were based on a finding that certain conduct could not constitutionally be held criminal.

Similarly here, Mr. Fiore's conduct, as proven by the Commonwealth, could not be held criminal as was determined by the Pennsylvania Supreme Court in *Scarpone*. Thus, to the extent that the Court determines that the *Scarpone* decision was a "new rule", the facts of this case fall within the first exception to the nonretroactivity principal.

VI. CONCLUSION

In the instant matter, a prisoner is being incarcerated, but without doubt not for the commission of the offense charged. As such, the Writ should be granted in order to remedy this aberrant and unjust situation.

Respectfully submitted,

LIEBER & HAMMER, P.C.

/s/ James B. Lieber
James B. Lieber, Esquire
PA I.D. # 21748
M. Jean Clickner, Esquire
PA I.D. # 42738
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

/s/ Harold Gondelman
Harold Gondelman, Esquire
Plowman Spiegel & Lewis, P.C.
Second Floor
The Grant Building
310 Grant Street
Pittsburgh, PA 15219-2204
(412) 471-8521

Date: 6/28/96

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE	:	
Petitioner	:	Civil Action No. 96-1231
v.	:	Judge Lancaster
GREGORY WHITE, et al	:	Magistrate Judge Caiazza
Respondents	:	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Thomas W. Corbett, Jr., Attorney General of the Commonwealth of Pennsylvania, by Andrea F. McKenna, Senior Deputy Attorney General, respectfully requests that the Petition for Writ of Habeas Corpus be denied and, in support thereof, states:

1. A seriatim answer is dispensed with for the sake of clarity.

Procedural History

2. Between February 4 and February 18, 1996, Fiore and his co-defendant Dave Scarpone were tried before the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County and a jury. On February 18, 1986, Fiore was found guilty of the following: disposing of hazardous waste and operating a hazardous waste facility without a permit (two counts); 35 P.S. § 6018.401(a); discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of residual wastes and operating a residual waste facility contrary to his

permit, 35 P.S. § 6018.302(a) perjury; 18 Pa. C.S. § 4902; obstruction of administration of the law, 18 Pa. C.S. § 5101; and criminal conspiracy, 18 Pa. C.S. § 903.

3. On July 2, 1986, Fiore was found guilty in a non-jury trial of additional charges not involving Scarpone but arising from the same factual situation as the charges tried during the February 1986 trial. Fiore was found guilty of: discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of hazardous wastes and operating a hazardous waste disposal facility without a permit, 35 P.S. § 6018.401 (a); disposing of residual wastes and operating a residual waste facility without permit (45 counts), 35 P.S. § 6018.302(a); using his property and the property of another as a solid waste disposal area without a permit (two counts), 35 P.S. § 6018.501(a); and disposing of residual wastes and operating a residual waste facility without a permit (four counts), 35 P.S. § 6018.301.

4. On April 10, 1987, sentence was imposed on the convictions from both trials, resulting in an aggregate sentence of six to twelve years in prison and a $200,000 fine. For his conviction of operating a hazardous waste facility without a permit in violation of the Solid Waste Management Act, 35 P.S. § 6018.401(a) (Count 1, tried February 1986), Fiore was sentenced to two and a half to five years in prison and ten years probation and fined $100,000. On Count 2, violating § 6018.40(a) (tried July 1986), Fiore was sentenced to two and a half to five years in prison, the sentence to run consecutively to the sentence imposed at Count 1. On his conviction of perjury (Count 5, tried in February 1986), Fiore was sentenced to one to two years imprisonment and five years probation.

5. Fiore timely filed a notice of appeal with the Pennsylvania Superior Court. The Superior Court *sua sponte* transferred Fiore's appeal to Commonwealth Court. By the provisions of the Judicial Code, 42 Pa.C.C. § 762(a)(2)(ii), Commonwealth Court had jurisdiction to review the judgment of sentenced imposed for the conviction of a crime defined by the Solid Waste Management Act. On Fiore's motion, his appeal was transferred back to Superior Court.

6. The issues raised by Fiore on direct appeal were as follows:[1] (1) Rule 1100 was violated by the Commonwealth; (2) sections 606(a) and (b) of the Solid Waste Management Act were unconstitutional in that both proscribed identical conduct but each provided for different penalties; in that sub-sections (a) and (b) created arbitrary classifications; that subsections (a) and (b) provided no guidance for prosecutors; and that subsections (a) and (b) constituted an unlawful delegation of authority to the prosecutors or agencies charged with enforcing them; (3) that certain provisions of the Solid Waste Management Act unconstitutionally delegate legislative authority to the Department of Environmental Resources (DER) and

[1] The list of issues at Paragraph 6 was derived from the opinion of Judge Novak of the Court of Common Pleas of Allegheny County denying Fiore's motion to modify sentence. Commonwealth v. Fiore, CC No. 8508740, slip op. (Allegheny County, January 19, 1988). This opinion is significant because the Pennsylvania Superior Court specifically stated that it affirmed Fiore's judgment of sentence "on the basis of the opinion of the court below." *Commonwealth v. Fiore*, No. 00485 Pittsburgh 1988, slip op. pp 3-4 (May 12, 1989) (memorandum) (Exhibit 5, Petitioner's Appendix)

the Environmental Quality Board (EQB) and that the regulatory scheme of the Solid Waste Management Act was unconstitutional in that the act does not state what regulations, if violated, would constitute a crime; that DER and EQB acted beyond the scope of their authority in including a particular condition for obtaining a permit; (4) that numerous charges were barred by the statute of limitations; (5) that the evidence was insufficient to sustain the conviction that Fiore operated a hazardous waste disposal facility without a permit; that the evidence was insufficient to prove that any discharges were made without a permit; that the evidence was insufficient to support the conviction of perjury; that the evidence was insufficient to support the conviction of obstruction of the administration of law; (6) that Count 1 was not proven within the statute of limitations; that the evidence was insufficient to prove that Fiore operated a hazardous and/or residual waste disposal facility with a permit from DER; that, in regard to counts 6 through 49, Fiore possessed the necessary permit to allow him to dispose of solid wastes generated by Ohio Barge Lines; that Fiore had prior written approval to dispose residual wastes from Conoco Coal; that, in regard to counts 50 and 51, Fiore possessed the necessary permit for disposal of wastes from U.S. Steel-Edgar Thompson Works; that, in regard to counts 54 and 55, Fiore did not own the property in question and so was not required to have a permit to dispose of wastes there; that the Commonwealth failed to present sufficient evidence that Fiore actually discharged wastes; that Fiore's actions in the matter at issue constitute, at best, a *de minimus* infraction of the applicable statutes due to the Commonwealth's failure to prove

actual resultant pollution; (7) that the sentence imposed was illegal and excessive.

7. The Superior Court affirmed the judgment of sentence in an unpublished memorandum opinion which specifically stated its reliance on the opinion of the trial court. *Commonwealth v. Fiore*, No. 00485 Pittsburgh 1988, slip op. (May 12, 1989) (memorandum) (Commonwealth Exhibit B; Exhibit 5, Petitioner's Appendix), *affirmance noted at* 391 Pa. Super. 634, 563 A.2d 189 (1989).

8. Fiore then filed a petition for allowance of appeal in the Pennsylvania Supreme Court raising the sufficiency of the evidence claim. The petition was denied in a per curiam order entered March 13, 1990 at No. 310 W.D. Allocatur Docket 1989.[2]

9. On August 5, 1991, more than two years after the Superior Court decided Fiore's direct appeal and more than a year after the Supreme Court denied Fiore allowance of appeal, thus making his appeal final, the Commonwealth Court of Pennsylvania decided the direct appeal of Fiore's co-defendant Dave Scarpone. Commonwealth Court determined that the state should have proceeded under a different provision of the Solid Waste Management Act and reversed the conviction of Scarpone with regard to the charge of causing and assisting in the operation of a hazardous waste disposal facility without a

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[2] Exhibit 8 of Petitioner's Appendix shows correspondence pertaining to the Supreme Court's denial of a petition for allowance of appeal of a Superior Court order at No. 494 Pittsburgh 1989, a case which is not the subject of the instant petition.

permit. Commonwealth Court affirmed Scarpone's conviction of obstructing the administration of law and other governmental function. (18 Pa.C.S. § 5101) *Scarpone v. Commonwealth*, 141 Pa. Commw. 560, 596 A.2d 892 (1991).

10. Scarpone filed in the Pennsylvania Supreme Court a petition for allowance of appeal of the decision affirming his conviction for obstructing the administration of law and other governmental function. The Commonwealth filed a cross-petition seeking review of the Commonwealth Court order vacating Scarpone's conviction for causing and assisting in the operation of hazardous waste disposal facility without a permit. Both Scarpone's petition and the Commonwealth's petition were granted.

11. On January 31, 1992, during the pendency of the *Scarpone* appeal before the Pennsylvania Supreme Court, Fiore filed an Application for Emergency Relief with the Pennsylvania Supreme Court at No. 9 W.D. Misc. Dkt. 1992. Fiore requested the Pennsylvania Supreme Court to take jurisdiction of the matter stated in the application pursuant to the Court's King's Bench powers, 42 Pa.C.S. § 726,[3] and to consolidate it with Scarpone's appeal. This

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[3] Section 726 provides as follows: "Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, *in any matter pending before any court or district justice of this Commonwealth* involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any state thereof and enter a final order or otherwise cause right and justice to be done." 42 Pa.C.S. § 726 (emphasis supplied). When Fiore filed his Application for Emergency Relief, requesting the Supreme Court to assume jurisdiction of his case, the matter of his Solid

application was denied without comment on March 25, 1992.

12. On December 15, 1993, the Supreme Court of Pennsylvania affirmed the judgment of Commonwealth Court in setting aside Scarpone's conviction for operating a hazardous waste disposal facility without a permit. *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) (Commonwealth Exhibit M; Exhibit 2, Petitioner's Appendix).

13. On January 27, 1993, following the Pennsylvania Supreme Court opinion in *Scarpone*, Fiore filed a second Emergency Application for Extraordinary Relief with the Supreme Court of Pennsylvania at No. 7 W.D. Misc. Dkt. 1994. In this application Fiore asked the Pennsylvania Supreme Court to apply the *Scarpone* decision to him. The Commonwealth filed an answer in opposition, arguing that on direct appeal Fiore had appealed the sufficiency of the evidence against him, while Scarpone had argued a question of statutory construction; namely, that the Solid Waste Management Act had a specific provision providing for a violation of the conditions of a permit and that the Commonwealth should have charged under that specific provision. The Commonwealth argued that Fiore was not entitled to share in the relief of Scarpone who had presented a different intermediate appellate court with an issue different than the one raised by Fiore. (Commonwealth Exhibits E and F) Cognizant of its recent opinion

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Waste Management Act conviction was not pending before any state court or district justice.

in *Scarpone*, the Supreme Court denied Fiore's petition on March 25, 1992.

14. Fiore then filed a petition for post conviction relief in the Court of Common Pleas of Allegheny County. Fiore alleged that his sentence should be set aside "by reason of the Supreme Court having held [in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993)] that the facts charged in the indictment do not constitute a crime." (Commonwealth Exhibit I: Exhibit 12, Paragraph 15, Petitioner's Appendix) This petition was denied in an order entered August 18, 1994.

15. Fiore appealed the lower court's denial of post conviction relief to Commonwealth Court. On the Commonwealth's motion, Commonwealth Court transferred the appeal to Superior Court on September 24, 1994. In this appeal, docketed in the Superior Court at No. 1892 Pittsburgh 1994, Fiore raised the following questions for review: whether relief was available through a writ of coram nobis; whether the reversal of Scarpone's conviction, and not Fiore's, denied Fiore the equal protection of law; whether Fiore was denied due process of law by being charged for conduct which did not constitute a crime. (Commonwealth Exhibit ___)

16. Fiore next filed an Emergency Application for Extraordinary Relief in the Pennsylvania Supreme Court at No. 107 W.D. Misc. Dkt 1994. (Exhibit 16, Petitioner's Appendix) Fiore again urged the Supreme Court to invoke its King's Bench powers and take jurisdiction of his case. This application was denied.

17. The Superior Court thereafter affirmed the lower court's denial of post conviction relief in an order

entered September 20, 1995. *Commonwealth v. Fiore*, 445 Pa. Super. 401, 665 A.2d 1185 (1995) (Commonwealth's Exhibit K; Exhibit 6, Petitioner's Appendix). The Superior Court understood the essence of Fiore's appeal to be that he possessed a permit issued by the Department of Environmental Resources for his waste disposal facility and so had an absolute defense to charges of Solid Waste Management Act violations. Accordingly, the Superior Court found that Fiore had litigated the issue on direct appeal and was therefore ineligible to raise the issue again in a post-conviction proceeding. 445 Pa. Super. at 415, 665 A.2d at 1192-93.

18. Fiore then filed a petition for allowance of appeal in which he asked the Pennsylvania Supreme Court to review whether the Superior Court failed to consider the *Scarpone* decision as the law of the case and whether the Superior Court failed to consider whether there are circumstances which warrant a departure from the eligibility requirements set forth in the Post Conviction Relief Act, 42 Pa.C.S. § 9542.

19. On or about July 3, 1996, Fiore filed the instant petition for writ of habeas corpus in which he asserts that he is presently incarcerated for conduct which is not a crime and that he has been denied due process and equal protection of the law by the courts of Pennsylvania which have failed to apply *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993).

Requirement That Petitioner Be "In Custody"

20. A court may entertain an application for a writ of habeas corpus on behalf of a person "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a).

21. In *Garlotte v. Fordice*, ___ U.S. ___, 115 S.Ct. 1948, 132 L.Ed 2d 36 (1995), the Supreme Court held that a federal habeas petitioner was "in custody" for purposes of section 2254(a) under all of his sentences until all are served and that the petitioner may attack the conviction underlying the sentence scheduled to run first in the series.

22. In addition to the six to 12 year sentence imposed on April 10, 1987, for convictions of the Solid Waste Management Act and perjury, Fiore was additionally sentenced in Allegheny County Common Pleas Court on April 14, 1987, for convictions of bribery, 18 Pa.C.S. § 4701; obstructing administration of law, 18 Pa.C.S. § 1101 and conspiracy, 18 Pa.C.S. § 903. An eighteen month to three year sentence was imposed on one count of bribery; followed by a consecutive sentence of eighteen months to three years on one count of obstructing the administration of justice.

23. On June 21, 1989, Fiore was sentenced in the Court of Common Pleas of Westmoreland County to a term of five to ten years in prison on a conviction of conspiracy to commit murder. This sentence was amended on July 14, 1989, to plainly state that the sentence was consecutive to any sentence already being served.

24. By virtue of the above-stated reasons, Fiore is "in custody" for purposes of section 2254(a) of Title 28 of the United States Code.

Exhaustion of Remedies

25. A convicted state prisoner may not seek federal habeas relief unless he has exhausted the remedies available in the state courts. 28 U.S.C. § 2254(b); *Anderson v. Harless*, 459 U.S. 4 (1982); *Burkett v. Cunningham*, 826 F.2d 1208, 1213 (3d Cir. 1987).

26. The exhaustion requirement is satisfied when the state courts have had an opportunity to pass upon and correct alleged constitutional violations. A claim must be presented not only to the trial court but also to the state's intermediate court as well as to its supreme court. *Evans v. Court of Common Pleas, Del. Cty, Pa.*, 959 F.2d 1227, 1230 (3d Cir. Pa. 1992).

27. To demonstrate compliance with the exhaustion requirements, a habeas applicant must show that the federal claim asserted in the federal court has been fairly presented to the state courts. *Ross v. Petsock*, 868 F.2d 639, 641 (3d Cir. 1989), *citing Santana v. Fenton*, 685 F.2d 71, 73 (3d Cir. 1982) *cert. denied* 459 U.S. 1115, 103 S.Ct. 750, 74 L.Ed 2d 968 (1983). It is not enough for the petitioner to show that he has presented the facts on which the federal claim is presented to the state court. Rather, the argument raised in the federal court must be the substantial equivalent of that presented to the state courts. Both the legal theory and the facts supporting a federal claim must have been submitted to the state court. *Id.*

28. The grounds for relief raised in the instant petition are that:

> [Fiore] is being held incarnated (*sic*) for conduct which the Supreme Curt (*sic*) has determined does not meet the elements of the crime charged; and
>
> He has been denied due process and equal protection by the Courts of Pennsylvania wherein they have failed to afford him application of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993)

Petition for Writ, p. 3.

29. In his petition for post conviction relief in the state trial court, Fiore raised no constitutional claims but asserted only that his sentence should be set aside "by reason of the Supreme Court having held [in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993)] that the facts charged in the indictment do not constitute a crime." (Commonwealth Exhibit G; Exhibit 12, Paragraph 15, Petitioner's Appendix)

30. In appealing the trial court's denial of post conviction relief, Fiore framed his issues so as to argue that his failure to obtain the same appellate relief as his co-defendant deprived him of the due process of law and the equal protection of the laws and subjected him to cruel and unusual punishment. *Commonwealth v. Fiore*, No. 1892 Pittsburgh 1994 (Brief for Appellant, Issues II and III) (Commonwealth's Exhibit I).

31. The Superior Court, looking to the language of the PCRA petition, understood the essence of Fiore's

appeal to be that he possessed a permit issued by the Department of Environmental Resources for his waste disposal facility and so had an absolute defense to charges that he had violated Solid Waste Management Act by operating without a permit. *Commonwealth v. Fiore*, 445 Pa. Super. 401, 409, 665 A.2d 1185, 1189 (1995). The Superior Court found that the allegation of error had been previously litigated. *Id.*, at 415, 665 A.2d 1192 (1995),[4] and declared Fiore ineligible for post conviction relief.

32. A fair reading of *Fiore*, 445 Pa. Super. 401, 665 A.2d 1185 (1995), is that Fiore challenged on direct appeal the sufficiency of the evidence of his conviction of Solid Waste Management Act violations throughout the Pennsylvania courts.

33. In considering whether a state court claim raised federal constitutional issues, the Third Circuit and its sister circuits have looked to the substance of the claim presented in the state courts, rather than its technical designation. *Evans v. Court of Common Pleas, Del. Cty., Pa.*,

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[4] The Superior Court cited to section 9543(a) of the Post Conviction Relief Act which establishes that eligibility for post conviction relief requires, among other things, proof by a preponderance of the evidence that the allegation of error has not been previously litigated. 42 Pa.C.S. § 9543(a). The Court then noted that Section 9544 explains that "an issue has been previously litigated if . . . the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. . . . " 42 Pa.C.S. § 9544(a)(2). In Pennsylvania, there is no appeal as of right from any final order of the Superior Court. Pa. R.A.P. 341(d).

959 F.2d 1227 (3d Cir. Pa. 1992), *citing cases from Third, Second, First and Ninth circuits.*

34. In *Jackson v. Virginia*, 443 U.S. 307, 322, 99 S.Ct. 2781, 2791, 61 L.Ed. 2d 560 (1979), the Supreme Court held that a challenge to a state conviction brought on a claim of insufficient evidence necessarily implicates federal due process rights.

35. To the extent this petition could be construed as a claim that there was insufficient evidence to sustain the conviction of violations of the Solid Waste Management Act, the claim has been exhausted.

36. No Pennsylvania court, directly or by inference, has stated that Fiore ever raised an issue of the statutory construction of the Solid Waste Management Act.

37. *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), the case of which Fiore seeks the benefit, is a case of statutory construction of the Solid Waste Management Act. In *Scarpone* the Pennsylvania Supreme Court decided that Scarpone would have been more appropriately charged under statutes providing penalty for violations of the conditions of a permit and "agreed with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection 634 A.2d at 1112.

38. To the extent that this petition can be construed as raising an issue of statutory construction of the Solid Waste Management Act, then the petition presents unexhausted claims.

39. To the extent that this petition can be construed as raising an issue of statutory construction of the Solid

Waste Management Act, the petition presents a nonconstitutional claim which is not cognizable under 28 U.S.C. § 2254(a), which allows the entertainment of an application of a state prisoner on the grounds that he is in custody "in violation of the Constitution or laws or treaties of the United States."

40. An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the Stats. [sic] 28 U.S.C. § 2254(b)(2), P.L. 104-133, effective April 25, 1996.

Discussion

The instant petition presents meritless claims and the writ should be denied.

I. BY STATE LAW FIORE WAS NOT ENTITLED TO APPLICATION OF *SCARPONE* AS HIS DIRECT APPEAL WAS COMPLETE AT THE TIME OF THE *SCARPONE* DECISION; FEDERAL DECISIONAL LAW REQUIRES NO DIFFERENT RESULT.

The fact that Fiore and Scarpone obtained different results in the state appellate courts does not require the conclusion that Fiore was deprived of the federal constitutional right of due process and equal protection of the law, or that he is incarcerated for conduct which does not constitute a crime. The different results obtained by Fiore and Scarpone are the products of different strategic decisions made by each and are not the result of the state impermissably denying equal protection or due process of law. Further, in affirming the reversal of Scarpone's

conviction, the Pennsylvania Supreme Court announced no new rule of constitutional significance; the *Scarpone* decision was one of statutory construction. The federal constitution does not compel a state to make retroactive a new construction of a state statute. *See Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 191, 38 L.Ed. 2d 179 (1973).

Both state and federal decisional law are in agreement that Fiore is not entitled to the benefit of *Scarpone* because Fiore's direct appeal was complete long before either the Commonwealth Court or the Supreme Court decisions in *Scarpone* were announced. Pennsylvania decisional law provides, "Even-handed decision making requires that similarly situated individuals *on direct appeal* be treated the same." *Commonwealth v. Brown*, 494 Pa. 380, 385, 431 A.2d 905, 907-08 (1981) (emphasis supplied). Under this general rule "a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occur before the judgment becomes final." *Id.*, at 385-87, 431 A.2d at 906-07. *Commonwealth v. Cabeza*, 503 Pa. 228, 469 A.2d 146, 148 (1983). *Commonwealth v. Metts*, ___ Pa. Super. ___, ___, 669 A.2d 346, 353 (1995) *allowance of appeal granted*, ___ Pa. ___, ___ A.2d ___ (1996).

Pennsylvania law on retroactive application tracks long-established federal decisional law. "Our prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review. *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Linkletter v. Walter*, 381 U.S. 618, 627, 85 S.Ct. 1731, 17236, 14 L.Ed. 2d 601 (1965); *Bradley v. School Board of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed. 2d 476

(1974), *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed. 2d 590 (1974).

Having completed his case on direct appeal more than a year before Commonwealth Court reversed Scarpone's conviction, and more than three years before the Pennsylvania Supreme Court decided *Scarpone*, Fiore had absolutely no claim to the benefit of *Scarpone*.

Pennsylvania law is equally clear that Fiore is not entitled to the benefit of *Scarpone* on collateral review. The Pennsylvania Supreme Court has held that cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final. *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180, 1183 (1986). In *Gillespie* the Pennsylvania Supreme Court specifically adopted the reasoning of the United States Supreme Court in *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed. 2d 38 (1985), where the court explained the rationale for applying full retroactivity to a pending and undecided direct review of a judgment of conviction and denying, or limiting, retroactivity, to a federal collateral attack upon a state conviction which has become final. 512 Pa. at 354, 516 A.2d at 1183. "[T]he distinction . . . properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere, the closing must come." *Id.*, at 354, 516 A.2d at 1183, *quoting* 470 U.S. at 59-60, 105 S.Ct. 1065, 1170, 84 L.Ed. 2d 38, 47 (1985).

Similarly, on federal habeas review the general rule is that "[N]ew constitutional rules of criminal procedure

will not be applicable to those cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310 109 S.Ct. 1060, 1075, 103 L.Ed. 2d 334 (1989). Only two exceptions apply: (1) If the new rule of criminal procedure places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; (2) if the new rule of criminal procedure is a "watershed rule of criminal procedure". *Id.* at 311, 109 S.Ct. at 1075-76.

Scarpone does not announce a new rule of criminal procedure; it does not place certain kinds of "primary, private individual conduct" beyond the power of the criminal law; it announces no "watershed rule of criminal procedure." *Scarpone* is the construction of a state criminal statute by a state supreme court. The holding of *Scarpone* is, "[T]he statutory language here [a subsection of the Solid Waste Management Act] cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection." 535 Pa. 279, 634 A.2d 1112.

Chief Justice Rehnquist, writing in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed. 2d 353 (1993), identified two interests in addition to the state's interest in finality of convictions which call for different standards for retroactivity on federal habeas review: comity and federalism. "The States possess primary authority for defining and enforcing the criminal law." *Id.* at ___, 113 S.Ct. 1710, 1720. It is these later principles which most compellingly support the conclusion that Fiore is not entitled to a writ of habeas corpus.

The United States Supreme Court has made plain that a state is not constitutionally compelled to make retroactive new construction of state statutes.[5] In *Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed. 2d 179 (1973). The Supreme Court reversed the grant of habeas relief to petitioners who had sought to have their convictions reversed by retroactive application of a Florida Supreme Court decision declaring the statute under which they had been convicted void for vagueness. The U.S. Supreme Court held that the law was not void at the time of the convictions, and found no constitutionally compelled reason for Florida to vacate previously obtained convictions in the wake of a new construction of state law. While there are differences between the facts of the instant petition and those of *Wainwright v. Stone*, the factual differences do not negate the application of the underlying principle of *Wainwright v. Stone*: that Pennsylvania had no obligation to apply the statutory construction of the Solid Waste Management Act as obtained in *Scarpone* to Fiore who had never raised an issue of statutory construction of the Solid Waste Management Act and whose conviction had long been final when *Scarpone* was decided.

In denying Fiore post-conviction relief, the Pennsylvania Superior Court said:

[5] Petitioner cites various cases concerning retroactive application of *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), 97 L.Ed. 2d 292 (1987), a case narrowing the scope of the federal mail fraud statute. In these federal cases concerning the construction of a federal statute, the principles of federalism and comity need not be considered.

> In reaching this result, we have not overlooked the uniqueness of appellant's situation. Appellant was convicted of operating a waste management facility without a permit, and his conviction was affirmed. His general manager, David (*sic*) Scarpone, was convicted of the same offense, and his conviction was reversed because, the appellate courts concluded, he had a permit. The permit in question was the same, however; it was appellant's as well as Scarpone's. Unsurprisingly, appellant views the situation as unjust.
>
> Nevertheless, the crucial fact is that appellant's direct appeal was no longer pending when the Supreme Court made the ruling which appellant now seeks to have applied to this case.

Commonwealth v. Fiore, 445 Pa. Super. 401, 416, 665 A.2d 1185, ___ (1995).

Fiore was not entitled as the benefit of *Scarpone* when the decision was handed down, he is not entitled to the benefit of *Scarpone* now. "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3392, 77 L.Ed. 2d 1090 (1983).

WHEREFORE, respondents respectfully request that the petition for writ of habeas corpus be denied without a hearing and that no certificate of probable cause issue.

Respectfully submitted,

Thomas W. Corbett, Jr.
Attorney General

By: /s/ Andrea F. McKenna
Andrea F. McKenna
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-6348

List of Commonwealth Exhibits

A. Petitioner's brief on direct appeal filed in Pennsylvania Superior Court

B. Superior Court opinion affirming judgment of sentence.

C. Opinion of the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County denying post verdict motions, used as basis of Superior Court's affirmance of judgment of sentence.

D. Petitioner's Application to the Pennsylvania Supreme Court Seeking Emergency Relief (N. 9 W.D. Misc. Dkt. 1992)

E. Petitioner's Second Application to the Pennsylvania Supreme Court Seeking Emergency Relief (No. 7 W.D. Misc. Dkt. 1994)

F. Commonwealth's Answer In Opposition to Emergency Application for Extraordinary Relief and Appendix

G. Petitioner's Motion for Post Conviction Relief

H. Lower court order denying post conviction relief

I. Petitioner's Brief in Superior Court on appeal of denial of post conviction relief (No. 1892 Pittsburgh 1994)

J. Petitioner's Reply Brief in Superior Court

K. Superior Court opinion denying post conviction relief, 665 A.2d 1185

L. Commonwealth Court opinion reversing conviction of Dave Scarpone for Solid Waste Management Act violations, 596 A.2d 892 (1990)

M. Pennsylvania Supreme Court opinion affirming reversal of Scarpone's conviction for Solid Waste Management Act violations. 634 A.2d 1109

N. Table of Contents, Issues Presented and Summary of Argument, Brief filed in Commonwealth Court on direct appeal of Dave Scarpone.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner	:	Civil Action No. 96-1231
v.	:	Judge Lancaster Magistrate Judge Caiazza
GREGORY WHITE, et al. Respondents	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two copies of the foregoing Response To Petition For Writ Of Habeas Corpus upon the person(s) and in the manner indicated below.

Service by first class mail
addressed as follows:

James B. Lieber, Esquire
5528 Walnut Street
Pittsburgh, PA 15232-2312

Herald Gondelman, Esquire
The Grant Building, Second Floor
310 Grant Street
Pittsburgh, PA 15219-2204
(Counsel for Respondent)

/s/ Andrea F. McKenna
ANDREA F. MCKENNA (Attorney I.D. #39717)
Senior Deputy Attorney General
Appeals and Legal Services Section
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 787-6348
Dated: August 2, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM FIORE, Petitioner, vs. GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh, Respondent, and THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Additional Respondent.	)	Case No. 961231

PETITIONER'S REPLY TO RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

COUNSEL FOR PETITIONER:

JAMES B. LIEBER, ESQUIRE
PA I.D. # 21748
LIEBER & HAMMER, P.C.
5528 WALNUT STREET
PITTSBURGH, PA 15232-2312
(412) 687-2231

HAROLD GONDELMAN, ESQUIRE
PLOWMAN SPIEGEL & LEWIS, P.C.
SECOND FLOOR
THE GRANT BUILDING
310 GRANT STREET
PITTSBURGH, PA 15219-2204
(412) 471-8521

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

NOW COMES Petitioner, William Fiore, by and through his undersigned counsel and files the within Reply to Response to Petition for Writ of Habeas Corpus.

1. In his Habeas Corpus petition, Petitioner raised a due process/sufficiency of the evidence claim and an equal protection claim.

2. Respondents have conceded that Plaintiff has exhausted the due process/sufficiency of the evidence claim. Thus, that claim is ripe for review.

3. To the extent that Petitioner has not exhausted his equal protection claim, Petitioner is amenable to dropping that claim so as to achieve a timely resolution of this petition.

DISCUSSION

The primary issue to be decided in resolving this Habeas Corpus petition is whether Petitioner William Fiore may benefit from the retroactive application of the Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*.

Under §§ 2254 and 2255, the Supreme Court has created separate retroactivity standards for new rules of

criminal procedure and new decisions of substantive criminal law.[1]

In Davis v. United States, 417 U.S. 333, 94 S.Ct. 2298 (1974), the Court articulated the appropriate standard for evaluating the retroactivity of new substantive criminal decisions. There the defendant's conviction, although already affirmed by the Ninth Circuit, was called into question by a new Ninth circuit decision, decided on nearly identical facts. Addressing the retroactivity of the new decision, the Supreme Court held that:

> The appropriate inquiry [is] whether the claimed error of law was a "fundamental defect which inherently results in a complete miscarriage of justice" and whether "it presents exceptional circumstances where the need for the remedy afforded" by collateral relief is apparent.

Id. at 346, 94 S.Ct. at 2305 (*quoting Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962)). The Court held that the situation presented by Davis – in which the defendant may have been convicted for acts which were

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[1] The Court first established this analytic distinction in *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876 (1973). There the Court held retroactive its decision in *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184 (1970), which prohibited prosecution of a defendant by both the municipality and the state for the same crime on double jeopardy grounds. The Court declined to analyze Waller's retroactivity under the extant procedural retroactivity standard, that of *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965), explaining that "Guarantees that do not relate to . . . procedural rules cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis." *Robinson*, 409 U.S. at 508, 93 S.Ct. at 878.

not considered criminal under the relevant statute – satisfied this standard. It concluded that the injustice that would occur but for the retroactive application of the new Ninth Circuit decision was sufficiently egregious to warrant retroactivity.

Respondents rely on the case *Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190 (1973), for the proposition that a state is not constitutionally compelled to retroactively apply new construction of state statutes. In *Wainwright v. Stone*, the Habeas Corpus petitioners sought benefit of a retroactive application of a Florida Supreme Court decision which made the statute under which they had been convicted void for vagueness and uncertainty. In reversing the lower court's grant of Habeas relief to these petitioners, the Supreme Court specifically determined that the petitioners knew, at the time of their actions, that their conduct was criminally proscribed based on prior cases decided under that statute.

Further the Supreme Court specifically determined that the situation in *Wainwright v. Stone* involved no violation of the "underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.* at 22, 94 S.Ct. at 192 (citing *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812 (1954)).

The facts in *Wainwright v. Stone* are sufficiently distinct from the facts in the case at hand so that its holding is not compelling here. Rather, the Court's care in distinguishing the facts in that case from a situation where an individual is held criminally responsible for conduct

which he could not reasonably understand to be proscribed, is key. In Fiore's situation, there was no previous case law interpreting the statute under which he was convicted which held that his conduct was criminally proscribed. Thus, he was never under any notice that such action was proscribed under that section of the Act.

A ruling that a trial court lacked power to convict a defendant for proven activity must necessarily be retroactive. The Supreme Court stated in *United States v. United States Coin & Currency*, 401 U.S. 715, 724, 91 S.Ct. 1041, 1046 (1971), that "Even the use of impeccable factfinding procedures could not legitimate a verdict" where "we have held that the conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity."

While Petitioner acknowledges that the burden is upon him to prove that the proceedings in state court were incorrect, the Court of Appeals for the Third Circuit has repeatedly noted that relief will be granted when circumstances compel such action "to achieve justice". See *United States v. Cariola*, 323 F.2d 180, 184 (3rd Cir. 1963). That Court has further acknowledged that "an assertion that a conviction was based on conduct and not covered by a criminal statute is of a 'fundamental character' ". *United States v. Osser*, 864 F.2d 1056, 1059 (3rd Cir. 1988) (citing *Davis v. United States, supra.*)

The issue presented in the case *sub judice* is not fundamentally one of retroactivity. The Pennsylvania Supreme Court in *Scarpone* clearly held *Fiore's conduct* not

covered by the statute prohibiting operating a waste facility without a permit *because Fiore had a permit*. The Superior Court's affirmance of Fiore's conviction was specifically overruled in *Scarpone*. The Supreme Court held "The two courts (Superior and Commonwealth) are clearly in conflict and this leaves the Attorney General's Office ill-advised on how it should proceed in such situations."

If the Attorney General is ill-advised, then it is difficult to rationalize Fiore serving ten years in prison for not committing the crime which the Attorney General was ill-advised in charging. Simple justice requires that the writ be granted.

CONCLUSION

Accordingly, Petitioner respectfully requests a prompt resolution of this petition, and a grant of all relief requested.

Respectfully submitted,

LIEBER & HAMMER, P.C.

/s/ James B. Lieber
James B. Lieber, Esquire
PA I.D. # 21748
M. Jean Clickner, Esquire
PA I.D. # 42738
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

Date: 8/21/96

/s/ Harold Gondelman
Harold Gondelman, Esquire
Plowman Spiegel & Lewis, P.C.
Second Floor
The Grant Building
310 Grant Street
Pittsburgh, PA 15219-2204
(412) 471-8521

Date: 8/21/96

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Reply To Response To Petition For Writ Of Habeas Corpus was served this 21st day of August, 1996, upon the following by first class mail, postage prepaid.

Andrea F. McKenna, Esquire
Senior Deputy Attorney General
Appeals and Legal Services Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

/s/ John Kimmell

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3288

WILLIAM FIORE

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, Appellants

BRIEF FOR APPELLANTS

Appeal from the Order entered April 25, 1997, by the Honorable Gary L. Lancaster of the United States District Court, Western District of Pennsylvania, at D.C. No. 96-CV-01231, granting Petition for Writ of Habeas Corpus

D. Michael Fisher
Attorney General

William H. Ryan, Jr.
Executive Deputy Attorney General
Director, Criminal Law Division

Robert A. Graci
Chief Deputy Attorney General
Appeals and Legal Services Section

Andrea F. McKenna
Senior Deputy Attorney General
Appeals and Legal Services Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-6348

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STATEMENT OF SUBJECT MATTER JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C.A. § 2254 (West Supp. 1997).

STATEMENT OF APPELLATE JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C.A. §§ 1291 (West 1993) and 2253 (West 1994).

STATEMENT OF ISSUES

Is the relief granted by the District Court in contravention of *Wainwright v. Stone*, 444 U.S. 21 (1973) which holds that a state is not constitutionally compelled to make retroactive new construction of state statutes?

Did the District Court, in applying *United States v. Woods*, 986 F.2d 669 (3d Cir. 1993), to the instant case, ignore the different standards of retroactivity applicable to direct and collateral review as enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1992)?

Did the relief granted by the District Court deviate from the proper role of federal habeas proceedings as enunciated in *Barefoot v. Estelle*, 463 U.S. 880 (1983)?

If this Court affirms the opinion of the District Court granting the writ of habeas corpus, should the case be remanded to the state trial court for re-sentencing in accordance with *Commonwealth v. Goldhammer*, 512 Pa. 587, 517 A.2d 1280 (1986)?

STATEMENT OF CASE

This is an appeal from an order of the United States District Court, Western District of Pennsylvania, granting a petition for a writ of habeas corpus to a prisoner serving a state sentence.

Between February 4 and February 18, 1986, William Fiore (hereinafter "Fiore") and his co-defendant Dave Scarpone were tried before the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County, Pennsylvania and a jury. On February 18, 1986, Fiore was found guilty of the following charges: disposing of hazardous waste and operating a hazardous waste facility without a permit (two counts); 35 P.S. § 6018.401(a); discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of residual wastes and operating a residual waste facility contrary to his permit, 35 P.S. § 6018.302(a); perjury, 18 Pa.C.S. § 4902; obstruction of administration of the law, 18 Pa.C.S. § 5101; and criminal conspiracy, 18 Pa.C.S. § 903.

On July 2, 1986, Fiore was found guilty in a non-jury trial of additional charges not involving Scarpone but

arising from the same factual situation as the charges tried during the February 1986 trial. Fiore was found guilty of: discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of hazardous wastes and operating a hazardous waste disposal facility without a permit, 35 P.S. § 6018.401 (a); disposing of residual wastes and operating a residual waste facility without permit (45 counts), 35 P.S. § 6018.302(a); using his property and the property of another as a solid waste disposal area without a permit (two counts), 35 P.S. § 6018.501(a); and disposing of residual wastes and operating a residual waste facility without a permit (four counts), 35 P.S. § 6018.301.

On April 10, 1987, Fiore was sentenced on the convictions from both trials, resulting in an aggregate sentence of six to twelve years in prison and a $200,000 fine. For his conviction of operating a hazardous waste facility without a permit in violation of the Solid Waste Management Act, 35 P.S. § 6018.401(a) (Count 1, tried February 1986), Fiore was sentenced to two and a half to five years in prison and ten years probation and fined $100,000. On Count 2, violating § 6018.40(a) (tried July 1986), Fiore was sentenced to two and a half to five years in prison, the sentence to run consecutively to the sentence imposed at Count 1. On his conviction of perjury (Count 5, tried in February 1986), Fiore was sentenced to one to two years imprisonment and five years probation.[1]

[1] In addition to the six to 12 year sentence imposed on April 10, 1987, for convictions of the Solid Waste Management Act and perjury, Fiore was additionally sentenced in Allegheny County Common Pleas Court on April 14, 1987, for convictions of bribery, 18 Pa.C.S. § 4701; obstructing administration of law, 18 Pa.C.S. § 1101 and conspiracy, 18 Pa.C.S. § 903. An eighteen month to three year sentence was imposed on one count of bribery; followed by a consecutive sentence of eighteen months to three years on one count of obstructing the administration of justice.

On June 21, 1989, Fiore was sentenced in the Court of Common Pleas of Westmoreland County to a term of five to ten years in prison on a conviction of conspiracy to commit murder. This sentence was amended on July 14, 1989, to plainly state that the sentence was consecutive to any sentence already being served.

Fiore timely filed a notice of appeal with the Pennsylvania Superior Court. The Superior Court *sua sponte* transferred Fiore's appeal to Commonwealth Court. By the provisions of the Pennsylvania Judicial Code, 42 Pa.C.S. § 762(a)(2)(ii), Commonwealth Court had jurisdiction to review the judgment of sentenced imposed for the conviction of a crime defined by the Solid Waste Management Act. On Fiore's motion, his appeal was transferred back to Superior Court.

The issues raised by Fiore on direct appeal were as follows:[2] (1) Rule 1100 was violated by the Commonwealth; (2) sections 606(a) and (b) of the Solid Waste

[2] This list of issues was derived from the opinion of Judge Novak of the Court of Common Pleas of Allegheny County denying Fiore's motion to modify sentence. Commonwealth v. Fiore, CC No. 8508740, slip op. (Allegheny County, January 19, 1988), Appendix, p. 1a. This opinion is significant because the Pennsylvania Superior Court specifically stated that it affirmed Fiore's judgment of sentence "on the basis of the opinion of the court below." Commonwealth v. Fiore, No. 00485 Pittsburgh 1988, slip op. pp. 3-4 (May 12, 1989) (memorandum), Appendix, p. 124a.

Management Act were unconstitutional in that both proscribed identical conduct but each provided for different penalties; in that sub-sections (a) and (b) created arbitrary classifications; that subsections (a) and (b) provided no guidance for prosecutors; and that subsections (a) and (b) constituted an unlawful delegation of authority to the prosecutors or agencies charged with enforcing them; (3) that certain provisions of the Solid Waste Management Act unconstitutionally delegate legislative authority to the Department of Environmental Resources (DER) and the Environmental Quality Board (EQB) and that the regulatory scheme of the Solid Waste Management Act was unconstitutional in that the act does not state what regulations, if violated, would constitute a crime; that DER and EQB acted beyond the scope of their authority in including a particular condition for obtaining a permit; (4) that numerous charges were barred by the statute of limitations; (5) that the evidence was insufficient to sustain the conviction that Fiore operated a hazardous waste disposal facility without a permit; that the evidence was insufficient to prove that any discharges were made without a permit; that the evidence was insufficient to support the conviction of perjury; that the evidence was insufficient to support the conviction of obstruction of the administration of law; (6) that Count 1 was not proven within the statute of limitations; that the evidence was insufficient to prove that Fiore operated a hazardous and/or residual waste disposal facility with a permit from DER; that, in regard to counts 6 through 49, Fiore possessed the necessary permit to allow him to dispose of solid wastes generated by Ohio Barge Lines; that Fiore had prior written approval to dispose residual wastes

from Conoco Coal; that, in regard to counts 50 and 51, Fiore possessed the necessary permit for disposal of wastes from U.S. Steel-Edgar Thompson Works; that, in regard to counts 54 and 55, Fiore did not own the property in question and so was not required to have a permit to dispose of wastes there; that the Commonwealth failed to present sufficient evidence that Fiore actually discharged wastes; that Fiore's actions in the matter at issue constitute, at best, a *de minimus* infraction of the applicable statutes due to the Commonwealth's failure to prove actual resultant pollution; (7) that the sentence imposed was illegal and excessive.

The Superior Court affirmed the judgment of sentence in an unpublished memorandum opinion which specifically stated its reliance on the opinion of the trial court. *Commonwealth v. Fiore,* No. 00485 Pittsburgh 1988, slip op. (May 12, 1989) (memorandum) *affirmance noted at* 391 Pa. Super. 634, 563 A.2d 189 (1989). Appendix, p. 124a.

Fiore then filed a petition for allowance of appeal in the Pennsylvania Supreme Court raising the sufficiency of the evidence claim. The petition was denied in a per curiam order entered March 13, 1990 at No. 310 W.D. Allocatur Docket 1989.

On August 5, 1991, more than two years after the Superior Court decided Fiore's direct appeal and more than a year after the Supreme Court denied Fiore allowance of appeal, thus making his appeal final, the Commonwealth Court of Pennsylvania decided the direct

appeal of Fiore's co-defendant Dave Scarpone. Commonwealth Court determined that the state should have proceeded under a different provision of the Solid Waste Management Act and reversed the conviction of Scarpone with regard to the charge of causing and assisting in the operation of a hazardous waste disposal facility without a permit. Commonwealth Court affirmed Scarpone's conviction of obstructing the administration of law and other governmental function. (18 Pa.C.S. § 5101) *Scarpone v. Commonwealth*, 141 Pa. Commw. 560, 596 A.2d 892 (1991). Appendix, p. 130a.

Scarpone filed in the Pennsylvania Supreme Court a petition for allowance of appeal, seeking discretionary review, of the decision affirming his conviction for obstructing the administration of law and other governmental function. The Commonwealth filed a cross-petition seeking review of the Commonwealth Court order vacating Scarpone's conviction for causing and assisting in the operation of hazardous waste disposal facility without a permit. Both Scarpone's petition and the Commonwealth's petition were granted.

On January 31, 1992, while the *Scarpone* appeal was pending before the Pennsylvania Supreme Court, Fiore filed an Application for Emergency Relief with the Pennsylvania Supreme Court at No. 9 W.D. Misc. Dkt. 1992. Fiore requested the Pennsylvania Supreme Court to take jurisdiction of the matter stated in the application pursuant to the Court's King's Bench powers, 42 Pa.C.S.

§ 726,[3] and to consolidate it with Scarpone's appeal. This application was denied without comment on March 25, 1992.

On December 15, 1993, the Supreme Court of Pennsylvania affirmed the judgment of Commonwealth Court which had set aside Scarpone's conviction for operating a hazardous waste disposal facility without a permit. *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) Appendix, p. 135a.

On January 27, 1993, following the Pennsylvania Supreme Court opinion in *Scarpone*, Fiore filed a second Emergency Application for Extraordinary Relief with the Supreme Court of Pennsylvania at No.7 W.D. Misc. Dkt. 1994. In this application Fiore asked the Pennsylvania Supreme Court to apply the *Scarpone* decision to him. The Commonwealth filed an answer in opposition, arguing that on direct appeal Fiore had appealed the sufficiency of the evidence against him, while Scarpone had argued a question of statutory construction; namely, that the Solid

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[3] Section 726 of Title 42 provides as follows: "Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, *in any matter pending before any court or district justice of this Commonwealth* involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done." 42 Pa.C.S. § 726 (emphasis supplied). When Fiore filed his Application for Emergency Relief, requesting the Supreme Court to assume jurisdiction of his case, the matter of his Solid Waste Management Act conviction was not pending before any state court or district justice. Accordingly, the Pennsylvania Supreme Court was unable to assume jurisdiction.

Waste Management Act had a specific provision providing for a violation of the conditions of a permit and that the Commonwealth should have charged under that specific provision. The Commonwealth argued that Fiore was not entitled to share in the relief of Scarpone who had presented a different, intermediate appellate court with an issue different than the one raised by Fiore. Cognizant of its recent opinion in *Scarpone*, the Supreme Court denied Fiore's petition on March 25, 1992.

Fiore then filed a petition for post conviction relief in the Court of Common Pleas of Allegheny County. Fiore alleged that his sentence should be set aside "by reason of the Supreme Court having held [in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993)] that the facts charged in the indictment do not constitute a crime." This petition was denied in an order entered August 18, 1994.

Fiore appealed the lower court's denial of post conviction relief to Commonwealth Court. On the Commonwealth's motion, Commonwealth Court transferred the appeal to Superior Court on September 24, 1994. In this appeal, docketed in the Superior Court at No. 1892 Pittsburgh 1994, Fiore raised the following questions for review: whether relief was available through a writ of coram nobis; whether the reversal of Scarpone's conviction, and not Fiore's, denied Fiore the equal protection of law; whether Fiore was denied due process of law by being charged for conduct which did not constitute a crime.

Fiore next filed an Emergency Application for Extraordinary Relief in the Pennsylvania Supreme Court at No. 107 W.D. Misc. Dkt. 1994. Fiore again urged the

Supreme Court to invoke its King's Bench powers and take jurisdiction of his case. This application was denied.

The Superior Court thereafter affirmed the lower court's denial of post conviction relief in an order entered September 20, 1995. *Commonwealth v. Fiore*, 445 Pa. Super. 401, 665 A.2d 1185 (1995) The Superior Court understood the essence of Fiore's appeal to be that he possessed a permit issued by the Department of Environmental Resources for his waste disposal facility and so had an absolute defense to charges of Solid Waste Management Act violations. Accordingly, the Superior Court found that Fiore had litigated the issue on direct appeal and was therefore ineligible to raise the issue again in a post-conviction proceeding. 445 Pa. Super. at 415, 665 A.2d at 1192-93. Appendix, p. 139a.

Fiore then filed a petition for allowance of appeal in which he asked the Pennsylvania Supreme Court to review whether the Superior Court failed to consider the *Scarpone* decision as the law of the case and whether the Superior Court failed to consider whether there are circumstances which warrant a departure from the eligibility requirements set forth in the Post Conviction Relief Act, 42 Pa.C.S. § 9542. The Supreme Court rejected the petition.

On or about July 3, 1996, Fiore filed a petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania, Appendix p. 148a, in which he asserted that he is presently incarcerated for conduct which is not a crime and that he had been denied due process and equal protection of the law by the courts of Pennsylvania which had failed to apply

Commonwealth v. Scarpone, 535 Pa. 273, 634 A.2d 1109 (1993) to his case. Respondents filed a response requesting that the petition for writ of habeas corpus be denied without a hearing.

In a report issued February 27, 1997, United States Magistrate Francis X. Caiazza recommended that the writ of habeas corpus be granted. On March 14, 1997, Respondents timely filed objections to the magistrate's report and recommendation.

On April 21, 1997, the Honorable Gary L. Lancaster, United States District Court Judge, adopted the Magistrate's Report and Recommendation and ordered that the petition for writ of habeas corpus be granted. The court further ordered respondents to release Fiore from the portion of his incarceration which pertains to the consecutive sentences imposed for the jury and non-jury trial convictions under 35 P.S. § 6018.401(a) and § 6018.606(f). This Order was entered April 25, 1997.

Respondents filed in the United States District Court for the Western District of Pennsylvania an application for a stay of the Order pending appeal. Respondents then timely filed this appeal.

STATEMENT OF FACTS

[4]The defendant was the owner and operator of a very successful business known as the Municipal and Industrial Disposal Company (MIDC) which is located in Elizabeth Township, Allegheny County. In 1979, he received a permit to dispose of various wastes including hazardous wastes.

In order to properly understand the issues in the case, we believe that a review of the regulation process would be helpful. For each type of waste or "waste stream" which the defendant intended to receive at his site, he was required to submit a "module" to the Department of Environmental Resources (DER) for approval. Known as "Module 1," this form indicates the type of waste, how it is generated, its chemical and physical characteristics, where it will be placed and how it will be disposed. The information is certified by an engineer employed by the landfill operator. The DER then reviews the proposal to determine whether the particular waste stream is compatible with: (1) other waste deposited on that site, and (2) the site liner.

Additionally, the DER considers whether any leachate generated by a particular waste stream is compatible

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[4] The statement of the facts is excerpted from Commonwealth v. Fiore, CC No. 8508740, (Allegheny County, January 19, 1988), Appendix, p. 1a. No published opinion in the *Fiore* case sets out the factual basis of his conviction for operating a hazardous waste disposal facility without a permit, 35 P.S. §§ 6018.606(f) and 6018.401. For ease in reading the convention of underling and single-spacing lengthy quotations will be foregone.

with the end treatment facility. Leachate is another term of art meaning the contaminent generated from either rain, surface or groundwater moving through already deposited waste.

Upon receipt of a module, the DER's technical staff reviews it. In certain instances, the module may be submitted to outside agencies for their review as well. Based upon this analysis, the DER will then either approve or reject the module. If rejected, the landfill operator may not deposit this particular waste at his facility.

Often, the modules do not contain sufficient date to be properly reviewed. They are then returned to the landfill operator for amendment. Modules are often submitted, returned, re-submitted, returned again, re-submitted yet again before they are ready to be reviewed by the DER staff for final disposition. Once accepted for final review by the DER, the review process could take anywhere from a few weeks to several months. With this background, we now turn to the specific facts in this case.

The defendant's disposal facility contained, *inter alia*, a Phase I disposal pit, a temporary disposal pit, and a demolition site. The defendant was licensed to receive certain streams of hazardous waste and deposit them in the temporary pit and later the Phase I pit. The pit was lined with natural clay which had been found to be sufficient to contain the wastes and keep them from seeping into the acquifer. After the pit was full, it was eventually to be closed and covered in order to return the site to its natural condition. In order to be sure that the hazardous wastes were not seeping into the environment, various monitoring systems were established.

Running under the Phase I pit was an under-drain which was identified as pipe 810. This under-drain converges with the 711 pipe in a manhole near the pit and emits a single discharge. The purpose of the under-drain, according to Dan Peterson, an operation supervisor in the DER, Pittsburgh Region of the Bureau of Solid Waste Management, was to "convey mine water beneath the disposal pit carrying it away from the liner. In addition, it was designed in the permit as a monitoring point . . . to check on the integrity of the liner. If the liner would fail, materials seeping out of the pit through the liner would appear in the under-drain. (N.T. 2/4/86, pp. 79-83)

In late 1982 and early to mid 1983, Mr. Peterson, during routine inspection visits, detected "a strong organic odor coming from the manhole." He described this odor as "very similar to the type of odor that one gets when one is around a disposal pit. Also, it's similar to odors you get at U.S. Steel coke-making facility." (N.T. 2/4/86, p. 96-97) Numerous samples of the discharge from the 711 and 810 pipes were collected by the DER and tested at their laboratory in Harrisburg. The samples tested positive for the presence of organic chemicals (*i.e.*, Benzene, Toluene and Xylene). (N.T. 2/4/86, pp. 202-205, 381-382, 528-530; Commonwealth Exhibits 15-22)

The DER officials informed the defendant that no additional requests to dispose of hazardous wastes would be approved "until this matter is resolved." (N.T. 2/4/86, p. 102) Subsequently, several meetings were held between the defendant and DER officials. As a result of these discussions, the defendant and the Commonwealth entered into a "Consent Order and Agreement." (Commonwealth Exhibit No. 13) The agreement provided that

Fiore would apply for a water quality permit (NPDES) which would set certain limits on the chemicals discharged from the site. If the discharge exceeded those limits, the defendant agreed either to establish a treatment plant on the site or collect the discharge and transport it to a treatment plant. (N.T. 2/4/86, pp. 103-104)

Subsequently, in November of 1983, James R. Shack, a solid waste specialist for the DER, who took samples from both the 810 pipe and the 711 pipe, noticed that the discharge flow from the 810 pipe had lessened significantly and the odors no longer existed. (N.T. 2/4/86, p. 207) On July 26, 1984, Mr. Shack observed that there was no discharge flow coming from the 810 pipe. As he was curious about this phenomenon, Mr. Shack climbed down into the manhole and then maneuvered himself up into the 810 pipe. When he did so, he discovered that the 810 pipe had been capped with three or four metal plates. (N.T. 2/4/86, pp. 209-211)

Charles Kroll, a welder, testified that he was contacted and hired during the summer of 1983 to cap the 810 pipe, install an elbow pipe and another smaller pipe which led to an as yet unused disposal pit. (N.T. 2/4/86, pp. 244-247) Mr. Kroll indicated that the defendant observed this pipe installation. In fact, he stated that the defendant instructed him to hide the smaller pipe with a "good size rock." (N.T. 2/4/86, pp. 245-246) Another welder, Elmer Holmes, testified that during the same time period, he was personally contacted and hired by the defendant to install a two-inch pipe below ground between two larger pipes. Stemming from the two-inch pipe was a stand pipe which stood perpendicular to it and reached the surface of the ground. Inside this stand

pipe and attached to the two-inch pipe was a valve which, with the aid of a socket-type wrench, could be turned on and off. (N.T. 2/4/86, pp. 305-311)

The capping of the 810 pipe prevented the flow of water from under the Phase I pit into the 810-711 monitoring point. This was the discharge which previously had given off organic odors leading to the finding that hazardous wastes were seeping into the aquifer running under the pit. The newly installed connecting pipe brought water from an as yet unopened disposal pit to a point in front of the cap. Had this alteration not been made, the capping of the 810 pipe would have prevented any flow at all at the monitoring point. A third alteration consisted of a hidden pipe operated by a buried valve covered over with rocks. When the valve was opened, this pipe permitted the drainage which had backed up behind the cap of the 810 pipe to flow through the monitoring point and on into an unnamed tributary of the Youghiogheny River. Tracy Opfar and John Opfar, employees of the defendant, testified that the co-defendant, Scarpone, and others, would open this valve at night and on weekends when the DER officials were not likely to appear to check the monitoring point.

Although the defendant was not charged with polluting the waterways, the Commonwealth's evidence established that when the valve was turned on, a discharge flowed from the outfall pipe into the tributary. Samples of this discharge were collected in small stainless steel buckets. (N.T. 2/4/86, pp. 424-433) These samples were transmitted to the DER laboratory in Harrisburg where they were analyzed by DER chemists, David Clemens and Homer Moore. The samples, marked Commonwealth's

Exhibits 44-A, 44-B, 45-A, and 45-B, all contained hazardous wastes. (N.T. 2/4/86, pp. 499-502, 529-530)

STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellants are unaware of the existence of any related case or proceeding in the federal courts.

STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

Review of a district court's decision to grant a writ of habeas corpus is plenary when the district court did not hold an evidentiary hearing and engage in independent fact-finding. *McAleese v. Mazurkiewicz*, 1 F.3d 159 (3d Cir. 1993); *Kontakis v. Beyer*, 19 F.3d 110 (3d Cir. 1994).

SUMMARY OF ARGUMENT

Federal courts are not forums in which to relitigate state trials. *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S. Ct. 3383, 3392, 77 L.Ed. 2d 1090 (1983). The District Court order, if allowed to stand, will cause the federal writ to issue for the purpose of over-riding the Pennsylvania courts' appropriate exercise of discretion and Pennsylvania's determination of when new cases will be retroactively applied. See *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986) (a new rule of law to which we give full retroactive effect will not be applied to any case on collateral review unless decision was handed down during pendency of appellant's direct appeal and issue was properly preserved there). That Fiore did not obtain post

conviction relief is a result of a state court applying state statutory law to find that an issue litigated on direct appeal cannot be litigated again in a post conviction proceeding and in acknowledging that state law on retroactivity also made Fiore ineligible to receive the benefit of the *Scarpone* decision. These circumstances do not rise to the deprivation of Fiore's constitutional rights. The instant petition does not present constitutional violations requiring the corrective action of the federal courts.

ARGUMENT

I. FIORE SUFFERED NO FEDERAL CONSTITUTIONAL VIOLATIONS BY PENNSYLVANIA'S DENIAL OF THE RETROACTIVE APPLICATION OF THE STATE SUPREME COURT DECISION IN *COMMONWEALTH v. SCARPONE;* FIORE IS ENTITLED TO NO FEDERAL HABEAS RELIEF.

Co-defendants William Fiore and Dave Scarpone were tried and convicted of operating a hazardous waste disposal plant without a permit, 35 P.S. § 6018.401(a). The judgment of sentence against Fiore was affirmed. In a separate appeal, the conviction of his co-defendant was overturned. Fiore obtained a result different from Scarpone because Fiore chose to raise different issues than Scarpone. Having chosen, with the assistance of counsel, a particular strategy, Fiore is entitled to the results of that strategy, and to no more. Fiore is not entitled to benefit from the decision reached in his co-defendant's appeal concerning an issue which Fiore had never raised and which was determined long after the completion of his own direct appeal. The Commonwealth of Pennsylvania

is entitled to the finality of Fiore's conviction as determined by the state appellate courts. The fact that co-defendants chose different strategies on appeal and obtained different results calls for no remedial action by the federal courts. The United States District Court for the Western District of Pennsylvania erred in granting Fiore's petition for a writ of habeas corpus. This Court should vacate the order entered by the District Court.

A. The State Court's Denial of Fiore's Federal Constitutional Claims Rests On An Independent and Adequate State Ground.

The Magistrate's Report, adopted by the District Court, concluded that Fiore had exhausted available state remedies and thus satisfied the threshold exhaustion requirement by repeatedly presenting the issues raised in his petition for a writ of habeas corpus "to the [Pennsylvania] Supreme Court either through a direct appeal, a PCRA petition or an Emergency Petition for Extraordinary Relief." Magistrate's report, p. 14. Respondents filed objections to this finding.

Fiore raised the following issues in his petition for a writ of habeas corpus:

> [Fiore] is being incarnated (*sic*) for conduct which the Supreme Curt (*sic*) has determined does not meet the elements of the crime charged; and
>
> He has been denied due process and equal protection by the Courts of Pennsylvania wherein they have failed to afford him application of the

> Pennsylvania Supreme Court's decision in *Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993)

Appendix, p. 151a.

A federal district court will not entertain a state prisoner's application for a writ of habeas corpus unless the petitioner has first exhausted the remedies available to him in the state courts. 28 U.S.C. § 2254(b), (c). The exhaustion requirement is satisfied when the petitioner has afforded the state's highest court a fair opportunity to address the claim. *Anderson v. Harless*, 459 U.S. 4 (1982). "Fair presentation" requires "a state prisoner . . . present the state courts with the same claim he urges upon the federal courts." *Picard v. Connor*, 404 U.S. 275, 276 (1971). "The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts." *Id.* at 276.

The Magistrate's finding of exhaustion through fair presentation is erroneous in several regards.

First, by authority of *Castille v. Peoples*, 489 U.S. 346 (1989), issues raised in Emergency Applications to the Pennsylvania Supreme Court cannot be considered to have been "fairly presented" to the state's highest court for the purpose of satisfying the exhaustion requirement. In the first of two Applications for Emergency Relief filed with the Pennsylvania Supreme Court, Fiore asked the Court to invoke its King's Bench powers, under 42 Pa.C.S. § 726, and consider his conviction, which had long been affirmed, along with its consideration of the appeal of his co-defendant Dave Scarpone. In the second Application for Emergency Relief Fiore again asked the Pennsylvania Supreme Court to invoke its King's Bench powers and,

apply its decision in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993) to him, although Fiore had no matter pending before any Commonwealth court or district justice.

In *Castille* the habeas petitioner raised various federal claims, "some of which had been raised before the state courts only in one or the other of [petitioner's] unsuccessful petitions for allocatur [discretionary appeal]." 489 U.S. at 346. The United States Supreme Court held that submission of a new claim to a State's highest court on discretionary review does not constitute a fair presentation. "[W]here the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reason [sic] therefor,' Pa.R.A.P. 1114. . . .[5] [r]aising the claim in such a fashion does not, for the relevant purpose, constitute 'fair presentation.' " 489 U.S. 346, 351.

The Pennsylvania Supreme Court may assume jurisdiction of a matter pending before any court or district justice of the Commonwealth under section 726 of Title 42, set out in its entirety herein at Note 3, if the issue is one "of immediate public importance." This criterium of

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[5] Pennsylvania Rule of Appellate Procedure 1114 states as follows: "Except as prescribed in Rule 1101 (appeals as of right from the Commonwealth Court), review of a final order of the Superior Court or the Commonwealth Court is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor."

"immediate public importance" is comparable to the criteria of "special and important reasons" for discretionary allowance of appeal set out in Pa.R.A.P. 114 and discussed in *Castille*. In addition, to invoke the state supreme court's extraordinary jurisdiction, a matter must be pending before a court or district justice. For purposes of habeas exhaustion analysis, Fiore's Emergency Applications to the Pennsylvania Supreme Court do not constitute "fair presentation" of the issues.

Second, the conclusion that Fiore exhausted his state remedies through fair presentation of his claims for relief overlooks the fact that Fiore was denied consideration of the federal claims which he raised for the first time in his petition for state post conviction relief on independent and adequate state grounds that would serve to bar federal habeas relief. In appealing to Superior Court the denial by the Court of Common Pleas of Allegheny County of his petition for post conviction relief, Fiore asserted that '[s]uch a result . . . deprives him of the due process of law and the equal protection of the laws and subjects him to cruel and unusual punishment." *Commonwealth v. Fiore*, 445 Pa. Super. 401, 403, 665 A. 2d 1185, 1186 (1995) Appendix, p. 139a. The Pennsylvania Superior Court determined that Fiore was not entitled to post conviction relief because he failed to meet the state statutory requirement that a petitioner plead and prove by a preponderance of the evidence that the allegation of error has not been previously litigated. 42 Pa.C.S. § 9543(a)(3). The Post Conviction Relief Act states that "an issue has been previously litigated if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue. . . . " 42 Pa.C.S.

§ 9544(a)(2). In seeking post conviction relief, Fiore "urged the trial court to vacate the sentences imposed on the charges of operating a hazardous waste facility without a permit because '[w]hat [appellant] is charged with having done is not a crime as decided by the Supreme Court of Pennsylvania on these very facts." *Commonwealth v. Fiore*, 445 Pa. Super. 401, 409, 665 A.2d 1185, 1188 (1995). Appendix, p. 142a. The Superior Court found the issue presented in Fiore's petition for post conviction relief to have been previously litigated.

> The trial court addressed [on direct review of the judgment of sentence] the present issue in the following terms:
>
> > The defendant alleges that the evidence was insufficient to prove that he operated a hazardous waste disposal facility without a permit from the [DER] for such disposal facility.
> >
> > In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he altered the groundwater monitoring system . . . and, as such, the existence of that permit constitutes an absolute defense to the charges. We find the defendant's contention unpersuasive.

445 Pa. Super. 401, 415, 665 A.2d 1185, 1192, *quoting* Trial Court Opinion, 1/9/88, at 44-48. Appendix, p. 145a. Citing *Commonwealth v. Szuchon*, 534 Pa. 483, 486, 633 A.2d 1098, 1099 (1993), for the proposition that "[i]t is settled law that an issue litigated on direct appeal cannot be litigated again in a post-conviction proceeding." the Superior Court found Fiore ineligible for post conviction

relief. 445 Pa. Super. at 416, 665 A.2d at 1192, Appendix, p. 145a.

"The [independent and adequate state ground] doctrine applies to bar federal habeas when a state could decline to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds." *Coleman v. Thompson*, 501 U.S. 772, 729-730 (1991).

Coleman explains that:

> [i]n the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what . . . [the United States Supreme] Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.
>
> . . .
>
> . . . The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

501 U.S. at 731-732. *Reynolds v. Ellingsworth*, 23 F. 3d 756, 763 (3d Cir. 1994).

For these reasons, the District Court erred in adopting the Magistrate's Report and Recommendations, particularly in its conclusion that the federal courts should entertain Fiore's habeas petition.

B. Fiore Was Subject To No Unusual Circumstances In The Process of the State Courts.

The Magistrate's Report and Recommendation, adopted by the District Court as its basis for the grant of relief, found Fiore entitled to the retroactive application of *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), in part, based on a finding of "unusual circumstances" in the operation of the state courts. This conclusion is in error.

The divergent results reached by co-defendants Fiore and Scarpone do not derive from "unusual circumstances" in the Pennsylvania courts or from any constitutional infirmity requiring the remedial action of the federal courts. Under applicable state rules of court, appellate courts are bound to consider only issues raised in the lower court. Pa.R.A.P. 302(a); *Commonwealth v. Jones*, 542 Pa. 418, 668 A.2d 114, n. 1 (1995); *Commonwealth v. York*, 319 Pa. Super. 13, 465 A.2d 1028 (1983) (new and different theory of relief may not be considered on appeal). While Fiore and Scarpone's convictions both derived from the same factual situation, Fiore and Scarpone each raised different issues on appeals brought before different, state intermediate appellate courts. Each raised different issues in seeking discretionary review by the Pennsylvania Supreme Court. From these divergent paths, different results insued.

On direct appeal, Fiore raised 22 issues before the Pennsylvania Superior Court: among them, whether the evidence was sufficient to sustain the conviction of operating a hazardous waste disposal facility without a permit. In reviewing claims of sufficiency of the evidence the reviewing court is to consider the evidence presented and all reasonable inferences in the light most favorable to the Commonwealth. *Commonwealth v. Stamps*, 493 Pa. 530, 427 A.2d 141 (1981). A claim that evidence was insufficient to support the verdict (Fiore's issue on direct appeal) implicitly accepts that the defendant was properly charged.

On his direct appeal in Commonwealth Court, Scarpone posed that it had been "error for him to be charged in Count 1 of the criminal information with operating a waste disposal facility without a permit when Fiore possessed a permit for the facility." *Scarpone v. Commonwealth*, 141 Pa. Commw. 560, 563, 569 A.2d 892, 893 (1990). Appendix, p. 131a. To resolve this issue, Commonwealth Court engaged in an analysis of statutory construction, a fact which the Magistrate Judge recognized. Report and Recommendation, p. 17, appended to Appellant's brief.

Superior Court and Commonwealth Court each reached "opposing conclusions," to use the Magistrate's term, not from any federal constitutional infirmity or from any other irregularity, but from the fact that Pennsylvania's two intermediate appellate courts were presented with different issues.

There is no constitutional infirmity in the fact that Fiore did not obtain Supreme Court review of his conviction, while his co-defendant Scarpone did. The Magistrate

Judge's report characterizes these different results as "internally inconsistent." Report and Recommendations, p. 14, appended to Appellant's Brief. "Under Pennsylvania law,. . . . allocatur review 'is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.' " *Castille v. Peoples*, 489 U.S. 346, 347 (1989), *quoting* Pa.R.A.P. 1114. In petitioning for allocatur Fiore and Scarpone raised different issues. The Pennsylvania Supreme Court exercised its discretion and reached different conclusions as to the importance of the different issues presented by Fiore and Scarpone. Such a result does not constitute " internal inconsistency." Even if it did, the matter would not call for the corrective action of the federal courts.

It was not "unusual," to use the characterization of the Magistrate, or constitutionally infirm, for the Pennsylvania Supreme Court to refuse either Fiore's first Application for Extraordinary Relief in which he asked the state supreme court to invoke its King's Bench powers and consider his already affirmed conviction along with Scarpone's appeal or his second Application for Emergency Relief in which Fiore asked the state supreme court to invoke its King's Bench powers and apply its decision in *Commonwealth v. Scarpone*, to him.

The so-called "King's Bench" powers of the Pennsylvania State Court are not unbridled. These extraordinary powers are codified at section 726 of the state's judicial code. The section provides:

> Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, *in any matter pending before any court or district justice of this Commonwealth* involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

42 Pa.C.S. § 726 (emphasis supplied). "Such jurisdiction is to be invoked sparingly, in matters of immediate public importance, and where the petitioner's rights are clearly demonstrated by the record." *Yohn v. Love*, 887 F. Supp. 773, 788 (E.D. Pa. 1995) *citing Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 387 A.2d 425, 430 (1978) *appeal dismissed*, 443 U.S. 913 (1979) For the Court to assume "plenary jurisdiction" of a matter, the matter must be "pending before any court or district justice of this Commonwealth." When Fiore asked the Pennsylvania Supreme Court to invoke its King's Bench powers he had no case pending before any court, or district justice, of the Commonwealth. There was no "matter" of which the Court could take jurisdiction. "The Pennsylvania Supreme Court cannot hear an appeal either by consent of the parties or by its own acquiescence if jurisdiction to hear the appeal is not established by law." *Yohn v. Love*, 887 F. Supp. 773, 787 (E. D. Pa. 1995), *citing* Pa. Const. Art 5, 2(c); *School District of Borough of West Homestead v. Allegheny County Board of School Directors*, 440 Pa. 113, 269 A. 2d 904 (1970). Again, Fiore was not subject to "unusual circumstances" in the disposition of his petitions for extraordinary relief. The Pennsylvania Supreme Court simply – and quite properly – refused to exercise jurisdiction it did not possess.

Further, the retroactive application of *Scarpone* would have been contrary to Pennsylvania decisional law on retroactive application of newly decided cases.

> In reaching this result, we have not overlooked the uniqueness of appellant's situation. Appellant was convicted of operating a waste management facility without a permit, and his conviction was affirmed. His general manager, David Scarpone, was convicted of the same offense, and his conviction was reversed because, the appellate courts concluded, he had a permit. The permit in question was the same, however; it was appellant's as well as Scarpone's. Unsurprisingly, appellant views the situation as unjust.
>
> Nonetheless, the crucial fact is that appellant's direct appeal was no longer pending when the Supreme Court made the ruling which appellant now seeks to have applied to his case. In *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180 (1986), our Supreme Court considered "whether full retroactivity of a case encompasses a collateral attack on the conviction." Id. at 354, 516 A.2d at 1181. The Court held that
>
> > a new rule of law to which we give full retroactive effect, will not be applied to any case on collateral review unless that decision was handed down during the pendency of an appellant's direct appeal and the issue was properly preserved there, or . . . is nonwaivable.
>
> *Id.* at 355, 516 A.2d at 1183. . . . In [*Commonwealth v.*] *Galloway*, [433 Pa. Super. 222, 640 A.2d 454 (1994), *appeal denied*, 538 Pa. 666, 649 A.2d 668 (1994)], for example, this Court held that a

> defendant whose conviction became final when the Supreme Court affirmed his judgment of sentence on September 24, 1981, was not entitled to post-conviction relief based on a ruling set forth in an opinion filed by the Supreme Court on October 19, 1981, barely a month later. We conclude, therefore, that there is no support in the case law of this Commonwealth for the result sought by appellant in this case.

Commonwealth v. Fiore, 445 Pa. Super. 401, 416, 665 A.2d 1185, 1193 (1995) (denying post conviction relief) Appendix, pp. 145a-146a.

In sum, Fiore was subject to no "unusual circumstances" in the process of the state courts. At every step of the process, the conduct of the state courts conformed to established practice. That Fiore obtained a result which displeases him is not a reason for the corrective action of the federal courts.

C. Neither State Law Nor Federal Habeas Law Entitles Fiore To The Retroactive Application of *Scarpone*.

The District Court granted Fiore habeas relief in apparent disregard of the fact that Pennsylvania's application of its decisional law concerning retroactive application of new judicial determinations violated no federal constitutional guarantees, *Blackwell v. State Ethics Commission*, 527 Pa. 172, 181, 589 A.2d 1094, 1098 (1991) (neither federal nor state constitution requires retroactive application of a new decision) and in apparent disregard of the distinction that federal decisional law on retroactivity draws between cases on direct appeal and cases in which

prisoners serving state sentences seek federal habeas corpus relief.

As discussed in the preceding section, Pennsylvania case law on retroactivity follows the basic principle that "even-handed decision making requires that similarly situated individuals *on direct appeal* be treated the same." *Commonwealth v. Brown*, 494 Pa. 380, 385, 431 A.2d 905, 907-08 (1981) (emphasis supplied). Under this general rule "a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occur before the judgment becomes final." *Id.*, at 385-87, 431 A.2d at 906-07. *Commonwealth v. Cabeza*, 503 Pa. 228, 469 A.2d 146, 148 (1983). *Commonwealth v. Metts*, 449 Pa. Super. 275, ___, 669 A.2d 346, 353 (1995) *allowance of appeal granted on other issues*, 544 Pa. 255, 675 A.2d 1238 (1996). The Pennsylvania Supreme Court has held that cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final. *Commonwealth v. Gillespie*, 512 Pa. 349, 516 A.2d 1180, 1183 (1986) (adopting the reasoning of *Shea v. Louisiana*, 470 U.S. 51 (1985)).

The retroactivity analysis adopted by Pennsylvania tracks long established federal principles. "Our prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review." *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Linkletter v. Walter*, 381 U.S. 618, 627 (1965); *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974). *Hamlin v. United States*, 418 U.S. 87 (1974).

The grant of a writ of habeas corpus obtains only when there has been a violation of the Constitution, laws or treaties of the United States. The Federal Constitution neither requires nor prohibits retroactive or prospective application of a new decision. *Linkletter v. Walker*, 381 U.S 618 (1965); *United States v. Johnson*, 457 U.S. 537 (1982). For this basic and over-arching reason, the District Court erred in granting Fiore federal habeas relief through the retroactive application of the Pennsylvania Supreme Court decision in *Scarpone*.

The general rule for federal collateral attack by means of a petition for a writ of habeas corpus is that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310 (1989). Only two exceptions obtain: (1) if the new rule of criminal procedure places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; (2) if the new rule of criminal procedure is a watershed rule of criminal procedure. *Id.* at 311.

In *Shea v. Louisiana*, 470 U.S. 51 (1985), the United States Supreme Court explained the rationale for applying full retroactivity to a pending and undecided direct review of a judgment of conviction and denying, or limiting, retroactivity, to a federal collateral attack upon a state conviction which has become final. "[T]he distinction . . . properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn.

Somewhere, the closing must come." *Id.*, at 354, *quoting* 470 U.S. at 59-60 (1985).

The state's interest in the finality of convictions remains a paramount reason for limiting retroactivity in instances of a federal collateral attack upon a state sentence. In *Brecht v. Abrahamson*, 507 U.S. 619 (1992), Chief Justice Rehnquist, writing the opinion of the court articulated other important considerations.

> The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. . . . The states possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.

Id., at 635.

The Pennsylvania State Supreme Court decision in *Scarpone* does not announce a new rule of criminal procedure; it does not place certain kinds of "primary, private individual conduct" beyond the power of the criminal law; it announces no "watershed rule of criminal procedure." *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), is a case wherein a state supreme court construes a state criminal statute. *Scarpone* holds, "[T]he statutory language here [section – of the Solid Waste Management Act] cannot be stretched to include criminal

activities which clearly fall under another statutory section or subsection." 535 Pa. at 279, 634 A.2d, 1009, 1112 The Magistrate's Report and Recommendations at page 17 itself characterizes *Scarpone* as "a statutory construction decision." This accurate characterization of *Commonwealth v. Scarpone* as a case of statutory construction presents yet another reason why the District Court erred in granting Fiore federal habeas relief through its retroactive application. The United States Supreme Court has made plain that a state is not constitutionally compelled to make retroactive new construction of state statutes. In *Wainwright v. Stone*, 414 U.S. 21 (1973), the Supreme Court reversed the grant of habeas relief to petitioners who had sought to have their convictions reversed by retroactive application of a Florida Supreme Court decision declaring the statute under which they had been convicted void for vagueness. The U.S. Supreme Court held that the law was not void at the time of the convictions, and found no constitutionally compelled reason for Florida to vacate previously obtained convictions in the wake of a new construction of state law. While there are differences between the facts of the instant petition and those of *Wainwright v. Stone*, the factual differences do not negate the application of the underlying principle of *Wainwright v. Stone:* that Pennsylvania had no obligation to apply the statutory construction of the Solid Waste Management Act as obtained in *Scarpone* to Fiore who had never raised an issue of statutory construction of the Solid Waste Management Act and whose conviction had long been final when *Scarpone* was decided.

The Magistrate's Report and Recommendation wrongly designates *Davis v. United States*, 417 U.S. 333

(1974), as setting the standard for retroactive application of a substantive change in the criminal law to a person in state custody. *Davis* concerns proceedings brought under 28 U.S.C. § 2255, which permits a federal prisoner to challenge his conviction as violative of the Constitution or laws of the United States. Such proceedings do not implicate the concerns of state sovereignty which the Supreme Court has recognized as being of paramount importance in proceedings brought by state prisoners, such as Fiore, under 28 U.S.C. § 2254. The holding of *Davis*, that a federal prisoner proceeding under 28 U.S.C. § 2255, is not precluded from seeking application of new law made since his trial and appeal, has no application to a state prisoner attacking his conviction under 28 U.S.C. § 2254 where questions of federalism and comity are paramount.

Similarly, the Magistrate's use of *United States v. Woods*, 986 F.2d 669 (3d Cir. 1992), as a vehicle to justify the grant of a writ of habeas corpus to a person in state custody is misplaced. *Woods* concerns direct review of an district court's denial of a motion to correct an illegal federal sentence. Because it concerns the review of a federal sentence, *Woods* does embrace the concerns of federalism and comity inherent in federal review of a state conviction. Accordingly, *Woods* has no proper application to the instant habeas petition of a person in state custody.

"The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1992), *collecting cases*. "The role of federal habeas proceedings, while important in assuring that constitutional rights are

observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The United States Supreme Court reiterated this principle in *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), writing that is is it [sic] "axiomatic – that federal habeas courts do not sit to re-examine state court determinations of state law." This Court has recognized that "federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Geschwendt v. Ryan*, 967 F. 2d 877, 888-889 (3d Cir. 1992).

Fiore, as discussed in sub-section "A," was afforded the orderly process of the state courts. The decision of the Pennsylvania Supreme Court in *Commonwealth v. Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), Appendix, p. 135a., is one of statutory construction. The Magistrate's Report at page 17 also characterizes *Scarpone* as a case if [sic] statutory construction. The federal constitution does not compel the retroactive application of new construction of state statutes – the result which Fiore sought and which the District Court provided. It was plain error for the federal Magistrate to have found that Fiore was denied "due process of law and equal protection of the law" by the Pennsylvania Supreme Court's failure to give Fiore the benefit of the retroactive application of *Scarpone*. This Court recently said, "[E]rrors of state law cannot be repackaged as federal errors simply by citing the Due Process Clause." *Johnson v. Rosemeyer*, No. 96-1861, slip op. at 11 (3d Cir., June 13, 1997) (affirming the denial of federal habeas relief to a state prisoner). Where, as here, there was no error of state law, the same basic principle

obtains: a federal claim cannot be made out simply by invoking the names of federal constitutional guarantees such as due process and equal protection of the law.

Fiore is much like the petitioner in *Johnson*, supra, of whom this Court wrote, "Johnson's problem is that he cannot point to a federal requirement that jury instructions on the elements of an offense when justification is an issue include particular provisions, nor can he demonstrate that the jury instructions deprived him of a defense which federal law provided to him." *Johnson*, supra, slip op. at 13. Fiore has cast his otherwise unreviewable claim as one implicating "due process and equal protection." Appendix, P. 151a. Simply invoking constitutional guarantees does not entitle Fiore to relief.

This Court recently said

> in a habeas corpus case, a federal court, unlike a federal court in a diversity of citizenship case, does not substitute for a state court. . . . [A] federal court in a habeas corpus case [must] be circumspect in re-examining state court decisions. . . . [A] federal habeas corpus proceeding is not an appeal from the underlying state proceeding.

Johnson v. Rosemeyer, No. 96-1861, slip op. at 20 (3d Cir. June 13, 1997) By granting Fiore federal habeas relief, the District Court has substituted itself for the state Supreme Court. For this reason, this Court should vacate the District Court order granting Fiore federal habeas relief.

II. IF THIS COURT AFFIRMS THE GRANT OF HABEAS RELIEF, THE CASE SHOULD BE REMANDED FOR RE-SENTENCING.

If this Court affirms the grant of federal habeas relief to Fiore, the Commonwealth respectfully requests the Court to remand for resentencing under authority of *Commonwealth v. Goldhammer*, 512 Pa. 587, 517 A.2d 1280 (1986). *Goldhammer* holds "that where a defendant appeals a judgment of sentence, he accepts the risk that the Commonwealth may seek a remand for resenting thereon if the disposition in the appellate court upsets the original sentencing scheme of the trial court." 512 Pa. at 593, 517 A.2d 1280, 1283. As this Court stated, "When a defendant challenges one of several interdependent sentences, he, in effect, challenges the entire sentencing plan." *United States v. Busic*, 639 F. 2d 940, 947 n. 10 (3d Cir. 1981) *cert. denied*, 452 U.S. 918.

Between February 4 and February 18, 1986, Fiore and his co-defendant Dave Scarpone were tried before the Honorable Raymond A. Novak of the Court of Common Pleas of Allegheny County, Pennsylvania and a jury. On February 18, 1986, Fiore was found guilty of the following charges: disposing of hazardous waste and operating a hazardous waste facility without a permit (two counts); 35 P.S. § 6018.401(a); discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of residual wastes and operating a residual waste facility contrary to his permit, 35 P.S. § 6018.302(a); perjury, 18 Pa.C.S. § 4902; obstruction of administration of the law, 18 Pa.C.S. § 5101; and criminal conspiracy, 18 Pa.C.S. § 903.

On July 2, 1986, Fiore was found guilty in a non-jury trial of additional charges not involving Scarpone but arising from the same factual situation as the charges tried during the February 1986 trial. Fiore was found guilty of: discharging industrial wastes without a permit, 35 P.S. § 691.301, 307; disposing of hazardous wastes and operating a hazardous waste disposal facility without a permit, 35 P.S. § 6018.401(a); disposing of residual wastes and operating a residual waste facility without permit (45 counts), 35 P.S. § 6018.302(a); using his property and the property of another as a solid waste disposal area without a permit (two counts), 35 P.S. § 6018.501(a); and disposing of residual wastes and operating a residual waste facility without a permit (four counts), 35 P.S. § 6018.301.

On April 10, 1987, Fiore was sentenced on the convictions from both trials, resulting in an aggregate sentence of six to twelve years in prison and a $200,000 fine. For his conviction of operating a hazardous waste facility without a permit in violation of the Solid Waste Management Act, 35 P.S. § 6018.401(a) (Count 1, tried February 1986), Fiore was sentenced to two and a half to five years in prison and ten years probation and fined $100,000. On Count 2, violating § 6018.40(a) (tried July 1986), Fiore was sentenced to two and a half to five years in prison, the sentence to run consecutively to the sentence imposed at Count 1. On his conviction of perjury (Count 5, tried in February 1986), Fiore was sentenced to one to two years imprisonment and five years probation.

Absent the convictions relating to operation of a hazardous waste disposal facility without a permit, the lower court might have chosen to impose sentences on Fiore's

conviction of 18 Pa.C.S. § 5101, obstruction of administration of the law, a second degree misdemeanor which carries, by application of 18 Pa.C.S. 106(b)(7), a maximum term of imprisonment of two years. The lower court may have chosen to impose a greater sentence on the conviction of perjury, 18 Pa.C.S. § 4902, a third degree felony which carries a maximum term of imprisonment of seven years, by authority of 18 Pa.C.S. § 106(b)(4).

CONCLUSION

For the reasons stated herein, Appellants respectfully request this Honorable Court to vacate the order of the United States District Court for the Western District of Pennsylvania entered April 25, 1997 at Civil Action No. 96-1231 granting the petition for a writ of habeas corpus.

Respectfully submitted,

D. Michael Fisher
Attorney General

William H. Ryan, Jr.
Executive Deputy Attorney General
Director, Criminal Law Division

Robert A. Graci
Chief Deputy Attorney General
Appeals and Legal Services Section

By: /s/ Andrea F. McKenna
Andrea F. McKenna (I.D. #39717)
Senior Deputy Attorney General
Appeals and Legal Services Section
(Attorney for Appellants)

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-6348

Dated: July 7, 1997

CERTIFICATION OF BAR MEMBERS

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit, having been admitted November 23, 1988.

/s/ Andrea F. McKenna
Andrea F. McKenna, Esquire

* * *

ATTACHMENTS EXCLUDED

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WILLIAM FIORE	:	
	:	Docket No.
v.	:	97-3288
GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Appellants	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two copies of the foregoing **Brief for Appellants and Appendix** upon the person(s) and in the matter indicated below:

Service by first class mail
addressed as follows:

M. Jean Clickner, Esquire
LIEBER & HAMMER
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231
(Counsel for Appellee)

/s/ Andrea F. McKenna
Andrea F. McKenna (ID# 39717)
Senior Deputy Attorney General
Appeals and Legal Services Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-6348
(Counsel for Appellants)

Dated: July 7, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-3288

WILLIAM FIORE

Appellee,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants

BRIEF OF APPELLEE

Appeal from the Order entered April 25, 1997, by the Honorable Gary L. Lancaster of the United States District Court, Western District of Pennsylvania, at D.C. NO. 96-CV-01231, granting petition for a writ of habeas corpus

James B. Lieber, Esquire
PA I.D. # 21748
M. Jean Clickner, Esquire
PA I.D. # 42738
Lieber & Hammer, P.C.
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

Counsel for Appellee

Harold Gondelman, Esquire
Plowman Spiegel & Lewis, P.C.
Second Floor
The Grant Building
310 Grant Street
Pittsburgh, PA 15219-2204
(412) 471-8521

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I. STATEMENT OF ISSUES RAISED

Appellee raised two related and intertwined issues in his Petition for Writ of Habeas Corpus. The first is whether Appellee was convicted, sentenced and incarcerated on the basis of facts which did not establish each element of the crime charged. That is, whether the evidence was insufficient to support the conviction. The second issue is whether the Pennsylvania Courts denied Appellee due process and equal rights by refusing to grant him benefit of the Pennsylvania Supreme Court's decision in *Scarpone*. That is, by refusing to give retroactive effect to that decision, Appellee is serving and has served years incarcerated on the basis of facts which do not constitute the crime for which he was convicted.

Although Appellee, through counsel, did everything to try to avoid the incongruous result that presently exists, he is still placed in the position of having to proceed by way of Writ of Habeas Corpus in the federal courts to seek justice and vindication of his right to due process and to be treated fairly and equally in this matter. That Appellee's actions did *not* constitute a crime, has been specifically and clearly decided by the Supreme Court of Pennsylvania.

II. STATEMENT OF FACTS

The relevant facts presented are not in dispute. Appellee, William Fiore, owned and operated a hazardous waste facility in western Pennsylvania under permit from the state's Department of Environmental Resources ("DER"). He, together with his employee Dave Scarpone, was charged with various criminal counts, including the operation of a hazardous waste disposal facility *without a permit* in violation of the Solid Waste Management Act (SWMA), 35 P.S. §§ 6018.401(a) and 6018.606(f), a felony.

The essence of this charge against Appellee and Mr. Scarpone was that they criminally operated a hazardous waste facility "without a permit".

During the jury's deliberations, the jury sent a question to the judge as follows: "By law, does a permit violation automatically revocate or suspend that permit, or must it be worded so in the permit?" (Supplemental Appendix[1] at 42).

The Court entertained argument from counsel for the Commonwealth and both co-defendants about the proper response to the jury's question. Appellee's counsel suggested that the proper answer to both parts of the jury's question was "no", because pursuant to the Pennsylvania Administrative Code, §§ 1917(a) and 1921(a), no environmental permit can be revoked, suspended or modified without affording the permittee an opportunity to appeal

---

[1] "Supplemental Appendix" refers to the supplemental appendix filed by Appellee Fiore and will be referred to hereinafter as "Supp'l. App."

such revocations, suspension or modification to the Environmental Hearing Board. The Commonwealth's counsel argued that a permit is granted for a specific activity and if the permittee alters that activity so as to commit conduct which is "clearly beyond the pale of the four corners of the permit", then there is "no permit." Upon considering the argument of all counsel, the Court instructed the jury as follows:

> THE COURT: Ladies and Gentlemen of the Jury: Your question is an indication to counsel and the court of the diligence with which you apply yourself to your responsibility. Your question focuses on a very intricate legal issue which is involved in this case, and we are not surprised that you focused on that issue in view of your application to your responsibility.
>
> Your question is in two parts. The first part asks, "By law, does a permit violation automatically revocate or suspend that permit?" The answer to that question is no. The second part of the question is: "Or must it be worded so in the permit?" The answer to that question is that it is not necessary that a permit as a matter of law specify all the ways in which it may be violated and thereby revoked. It does not have to specify the ways in which it may be violated or revoked.
>
> In order to help you understand the allegations, I would like to amplify those answers.
>
> Clearly, the MIDC facility had a permit to operate a hazardous waste facility. You know that's been made clear during the course of the case. And, as a matter of law, every violation of the conditions of that permit would not result.

> There is a way in which violations are handled. In fact, you heard testimony with regard to violations and the way those violations were handled.
>
> The allegations in this case are that Mr. Fiore and/or Mr. Scarpone so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation of a hazardous waste facility.
>
> The question of fact for you to decide is, on what testimony will you hang your hat. In other words, whom you believe and whom you do not believe.
>
> Secondly, was the violation or the alteration so substantial a part of the condition of the permit that the operation of the facility thereafter was an operation of a facility without a permit?
>
> These are questions of fact for you to answer.
>
> I hope that gives you some better understanding of the law and will help you reach a verdict in this matter.
>
> You may return to deliberate.

Thereafter, the jury returned with a verdict of guilty as to both Appellee and Mr. Scarpone. Appellee was sentenced to a total of five to ten years in prison, fined $200,000.00 and placed on probation for twenty-five years. Each co-defendant appealed to the Superior Court of Pennsylvania. On its own motion, the Superior Court transferred the appeals to the Commonwealth Court. On

Appellee's motion, the Commonwealth Court transferred his appeal back to the Superior Court, but it retained the Scarpone appeal.

Mr. Scarpone's appeal was decided by the Commonwealth Court in a reported case at *Commonwealth v. Scarpone*, 596 A.2d 892 (Pa. Commw. 1991), *aff'd* 634 A.2d 1109 (Pa. 1993). The Commonwealth Court held that since Appellee had a permit to operate the facility, his employee Mr. Scarpone could not be convicted of operating a waste disposal facility *without a permit;* Mr. Scarpone's conviction was reversed. The Commonwealth appealed the Commonwealth Court's decision to the Supreme Court of Pennsylvania.

Appellee's appeal to the Superior Court resulted in an affirmance of the conviction in an unpublished Memorandum Opinion, *Commonwealth v. Fiore*, 563 A.2d 189 (Pa. Super. 1989). The Supreme Court denied Fiore's petition for allowance of appeal.

The Supreme Court granted the Commonwealth's petition for allocatur in *Scarpone* so as to resolve the conflicting decisions between the Superior and Commonwealth Courts. Although he had exhausted his appeal process, Appellee Fiore petitioned the Pennsylvania Supreme Court to reconsider his conviction in conjunction with its review of the *Scarpone* case, by Emergency Application for Extraordinary Relief, at No. 9 W.D. Misc. Dkt. 1992. (Supp'l. App. at 1). By that Petition, Appellee offered the Pennsylvania Supreme Court a district opportunity to eradicate this unfair and unequal application of the law in a timely manner. The commonwealth cannot now be heard to argue that Appellee is remiss in raising

this issue on a federal forum. Appellee pursued every avenue available to him to obtain timely and appropriate relief in the state system. The Court recognized the identity of the situations in *Scarpone* and *Fiore* when, in its opinion affirming the Commonwealth Court reversal of Scarpone's conviction, the Supreme Court held:

> The two courts are clearly in conflict and this leaves the Attorney General's office ill-advised on how it should proceed in such situations. *We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit* against Mr. Scarpone under the statute. Simply put Mr. Scarpone did have a permit.

Commonwealth v. Scarpone, 634 A.2d 1109 (Pa. 1993) (emphasis supplied). It bears repeating that the permit which Mr. Scarpone had was the permit of his employer, Appellee William Fiore.

The Supreme Court noted that a more appropriate charge against Mr. Scarpone and Appellee could have been brought under alternative provisions of the statute. However, it concluded:

> the alteration of the monitoring pipe here was execrable and constituted a clear violation of the conditions of the permit. But to conclude that the alteration constituted the operation of a new facility *without a permit* is a bald fiction we cannot endorse. Penal provisions of a statute must be strictly construed under 1 P.S. § 1928(b)(1).

Scarpone, 634 A.2d at 1112 (emphasis in original). Refusing to condone the "bald fiction", the Supreme Court affirmed the commonwealth Court's reversal of Scarpone's conviction.

Thereafter Appellee filed another Emergency Application for Extraordinary Relief to the Supreme Court of Pennsylvania, at No. 7 W.D. Misc. Dkt. 1994, by which he requested the Court exercise its extraordinary King's Bench powers, and give him the benefit of the Court's decision in *Scarpone*. That application was denied. (Supp'l. App. at 60).

Appellee then filed a motion for post-conviction collateral relief with the trial court (Supp'l. App. at 9). Appellee again requested that the Supreme Court's *Scarpone* decision be applied to him. The trial court denied the motion for post-conviction collateral relief and its decision was affirmed by the Superior Court. *Commonwealth v. Fiore*, 665 A.2d 1185 (Pa. Super. 1995) (App. at 139a).

In affirming the lower court's denial of Appellees PCRA petition, the Superior Court framed the relevant issue as follows:

> At the heart of this appeal is the fact that although appellant's employee and co-defendant, David Scarpone, has obtained from the courts of this Commonwealth a reversal of his conviction on the charge of operating a hazardous waste facility without a permit, appellant had failed to obtain the same relief. Such a result, appellant contends, deprives him of the due process of law and the equal protection of the laws and subjects him to cruel and unusual punishment.

Id. at 1186. The Superior Court affirmed the PCRA denial not on the merits, but upon determining that Appellee had previously exhausted this issue on direct appeal;

and, pursuant to the PCRA, such exhaustion on direct appeal precluded PCRA relief. The Court wrote:

> One such [PCRA] requirement is the obligation to plead and prove by a preponderance of the evidence that the allegation of error has not been previously litigated. 42 Pa.C.S. § 9543(a)(3). Section 9544 explains in pertinent part that "an issue has been previously litigated if . . . the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue . . . 42 Pa.C.S. § 9544(a)(2).
>
> We agree with the trial court that appellant has failed to meet this requirement. As noted earlier, this Court disposed of the twenty-two issues in appellant's direct appeal by affirming on the trial court's opinion. The trial court addressed the present issue in the following terms:
>
> > The defendant alleges that the evidence was insufficient to prove that he operated a hazardous waste disposal facility without a permit from the [DER] for such disposal facility.
> >
> > In essence, the defendant contends that he possessed a permit issued by the DER for his waste disposal facility during the time that he altered the groundwater monitoring system . . . and, as such, the existence of that permit constituted an absolute defense to the charges. We find the defendant's contention unpersuasive.

Id. at 1192 (emphasis supplied).

Appellee is presently incarcerated in the State Correctional Institution at Pittsburgh, Pennsylvania on a five-

to-ten year sentence for committing acts which the Supreme Court of Pennsylvania, under identical facts, has specifically held were never criminal under the penal provisions charged.

III. STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellee is aware of no related cases or proceedings.

IV. STATE OF STANDARD OR SCOPE OF REVIEW

Review of a district court's decision to grant a writ of habeas corpus is plenary when the district court did not hold an evidentiary hearing and engage in independent fact-finding. *McAleese v. Mazurkiewicz*, 1 F.3d 159 (3d Cir. 1993); *Kontakis v. Beyer*, 19 F.3d 110 (3d Cir. 1994).

V. SUMMARY OF THE ARGUMENT

Appellee Fiore is unconstitutionally confined on the basis of a conviction for operating a hazardous waste facility without a permit. The uncontested facts are that, at all relevant times, Appellee did possess the requisite permit.

Appellee's conviction without sufficient evidence constitutes a violation of due process. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979). Appellee exhausted this claim during his direct appeals in the state courts.

Appellee's second argument is that the state courts violated both his due process and equal protection right

to retroactive application of the Pennsylvania Supreme Court's subsequent decision in *Commonwealth v. Scarpone*, wherein it concluded, upon identical facts, that Appellee's employee was improperly convicted of operating a hazardous waste facility without a permit.

This issue was exhausted in state proceeding both by Appellee's Kings Bench petitions and by way of his post conviction petition for relief.

Further, Appellee contends that the *Scarpone* decision is not a "new statement of law" which cannot be retroactively applied. Rather, in *Scarpone* the Court simply ruled, based on a [sic] well-established principles, that Scarpone's (and Appellee's) possession of a permit negated a finding of guilt under the statutory section charged.

If, however, this Court concludes that the *Scarpone* decision did constitute a new rule of law, the Court may still find that Appellee's due process and equal protection rights were violated by the state courts' refusal to apply *Scarpone* retroactively to Appellee.

VI. DISCUSSION

A state prisoner is entitled to federal habeas relief if he is being held "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner Fiore's conviction and incarceration run afoul of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution in that he is currently incarcerated on the basis of facts that never constituted a crime under the section

of the Pennsylvania crimes Code upon which he was charged and convicted.

Appellee Fiore is confined at the State Penitentiary under a sentence of 5 to 10 years, $200,000.00 in fines, costs, and 25 years probation for committing acts which the highest court of Pennsylvania conclusively found did not constitute a crime under the sections charged of the Solid Waste Management Act.

A. DUE PROCESS – INSUFFICIENCY OF THE EVIDENCE

Resolution of this matter may simply be based on the clear and undisputed fact that the Commonwealth did not prove, beyond a reasonable doubt, each essential element of the crime charged. That is that, as a matter of law, the evidence was insufficient and thus, Appellee Fiore was improperly convicted and is currently being unconstitutionally detained.

In *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 90 S.Ct. at 1073.

Following *Winship*, the Court later logically ruled that claims of insufficiency of the evidence upon which to base a conviction are cognizable as a due process violation reviewable by writ of habeas corpus. *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2790. In reviewing

challenges to the sufficiency of the evidence, the question for habeas courts is not whether there was any evidence to support a conviction, but "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Sullivan v. Cuyler*, 723 F.2d 1077 (3d Cir. 1983) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979) *Paullet v. Howard*, 634 F. 2d 117 (3d Cir. 1980). *See, generally, United States v. Messerlian*, 832 F.2d 778, 796 (3d Cir. 1987).

The statutory section under which Appellee was convicted reads:

> (a) No person . . . shall store, transport, treat, or dispose of hazardous waste within this Commonwealth . . . unless such person . . . has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department [of environmental resources].

35 P.S. § 6018.401(a). An essential element of this crime is the lack of a permit. The Commonwealth does not dispute that Appellee Fiore possessed a DER-authorized permit to operate his facility at all relevant times.

Appellee argued during his criminal trial and on direct appeal that his possession of a permit constituted an absolute defense to this crime. That is, the undisputed evidence was clearly insufficient to establish each element of the crime. And, in fact, that is exactly what the Pennsylvania Supreme Court ruled in *Scarpone*.

Appellee raised and exhausted this issue on direct appeal.[2]

Thus, this Court may conclude its analysis at this point. Appellee is unconstitutionally incarcerated an [sic] the basis of undisputed facts that he was convicted of an offense for which the Commonwealth was unable to establish each and every essential element.

B. EXHAUSTION OF DUE PROCESS/SUFFICIENCY OF THE EVIDENCE

The general principles covering the responsibility of the petitioner to exhaust all federal claims are well-established. The exhaustion requirement is satisfied when the state courts have had an opportunity to pass upon and correct alleged constitutional violations. *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1230 (3rd Cir. 1992).

Of particular significance is whether the federal claim has been "fairly presented" to the state courts. *See,*

---

[2] In its Brief on Appeal, the Commonwealth wrote:

> The issues raised by Fiore on direct appeal were as follows: . . . (5) that the evidence was insufficient to sustain the conviction that Fiore operated a hazardous waste disposal facility without a permit; that the evidence was insufficient to prove that any discharges were made without a permit; . . .
>
> * * *
>
> Fiore then filed a petition for allowance of appeal in the Pennsylvania Supreme Court raising the sufficiency of the evidence claim.

Appellant's Brief at 6-7.

Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509 (1971). This requires that the claim brought in federal court be the substantial equivalent of that presented to the state courts. *Santana v. Fenton*, 685 F.2d 71, 74 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1115, 103 S.Ct. 750 (1983). Both the legal theory and the facts underpinning the Federal claim must have been presented to the state courts, *Gibson v. Scheidemantel*, 805 F.2d 135, 138 (3rd Cir. 1986), and the sane Method of legal analysis must be available to the state court as will be employed in the federal court. *Santana*, 685 F.2d at 74.

It is undisputed that Fiore's challenge to the sufficiency of the evidence to support his conviction was raised and fully litigated through the state system; however, it was not expressed as a federal due process violation on direct appeal.

Nonetheless, the Third Circuit looks to the substance of a claim presented to the state courts, rather than its technical designation. *Evans*, 959 at 1231 (citing *Bisaccia v. Attorney General of the State of New Jersey*, 623 F.2d 307 (3rd Cir. 1980). In *Bisaccia*, a state prisoner argued unsuccessfully in the state courts that the trial court had erred in allowing into evidence the guilty plea of a co-conspirator without a limiting instruction. In his habeas petition, Bisaccia asserted for the first time that admitting the contested evidence violated his Fourteenth Amendment due process rights. On appeal, this Court reasoned that the Petitioner's state claim had led the New Jersey Supreme Court into "a method of analysis consistent with Fourteenth Amendment due process determinations." *Id.* at 311. And, because the substance of the Appellant's state claim was virtually indistinguishable from the due

process allegation and because the method of analysis was indistinct, exhaustion of state remedies had been met. *Id.* at 312.

The facts in *Evans v. Court of Common Pleas* are virtually indistinguishable from those at issue here. Therein, the habeas petitioner alleged that the facts were insufficient at her state court trial to support her conviction of third degree murder. The District Court dismissed her habeas petition contending that she had not exhausted this due process claim on direct appeal to the state courts.[3] On appeal, however, the Third Circuit recognized that:

> Although "substantive deviations between superficially similar federal and state claims often exist," if an individual's claim, arising under and asserted in terms of state law, is "functionally identical – a point of more than trifling concern" to the federal claim, "we must regard the federal claim as fairly presented."

595 F.2d at 1231 (*citing Nadworny v. Fair*, 872 F.2d 1093, 1099-1100 (1st Cir. 1989)).

Further, the *Evans* Court determined that the test for insufficiency of the evidence is the same under both

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[3] In the appeal to the Superior Court *Evans* challenged the sufficiency of the evidence without invoking the term "due process". However, in her petition for allocatur to the State Supreme Court, Evans challenged the sufficiency of the evidence as a violation of the United States Constitutions Due Process Clause. The District Court found this difference in phrasing to be fatal to Evans' habeas claim that the evidence was constitutionally insufficient.

Pennsylvania and federal law. That is, "the test for determining sufficiency of evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the jury could reasonably have determined all elements of the crime had been established beyond a reasonable doubt." 595 F.2d at 1232. In addition, the *Evans* Court noted that the Petitioner's insufficiency of the evidence claims qualified as an "assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution." *Id.* (*citing Dave v. Attorney General of New York*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc.)).

The Supreme Court's holding in *Jackson v. Virginia*, that "a challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a constitutional claim" establishes that an insufficiency of the evidence claim necessarily implicates Federal due process rights. *Evans*, 959 F.2d at 1233.

Based on this Court's ruling in *Evans v. Court of Common Pleas*, it is clear that Appellee has exhausted his Constitutional claim of the insufficiency of the evidence at all levels of state review and, thus, this claim is ripe for review.

C. DENIAL OF DUE PROCESS AND EQUAL PROTECTION

Appellee's second contention is that he was denied due process and equal protection of the laws when the

state courts refused to apply the Supreme Court's *Scarpone* decision to him on either his King's Bench or PCRA petitions.

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to **any person** within its jurisdiction the equal protection of the laws." (emphasis supplied). As the Supreme Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 846 (1948). At bottom, the Equal Protection Clause guarantees that local, state and the federal governments treat similarly situated persons similarly; it restrains arbitrary governmental classifications which lead to invidious discrimination. *See Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985). The constitutional prohibition extends both to statutes which, on their faces, draw discriminatory classifications, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879), and to statutes which, when applied, lead to discriminatory classifications. *See Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941 (1979).

Not all differential treatments by government are proscribed; nor are all government-made classifications or differential-treatments reviewed under the same standard. Statutes or actions which purposefully impair a fundamental right or deal with a "suspect classification," are subject to "strict scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973). Under this standard of review, the government-made

classification or treatment is upheld only if it is found to be necessary to obtain a compelling government objective. Few government-made classifications pass this rigorous test. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972).

In the absence of either purposeful impairment of a fundamental right or suspect classification, a less rigorous standard of review is applied. This standard of review is often referred to as the "mere rationality" standard. *See Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337 (1911). When this standard is applied, the judicial inquiry is limited to ascertaining whether the classification in issue bears a rational relation to a permissible governmental objective. *See Cleburne, Texas*, 473 U.S. 432, 105 S.Ct. 3249; *Metropolitan Life Insurance Co. v. Ward*, 470 U. S. 869, 105 S.Ct. 1676 (1985); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337 (1911) (law will be stricken only if "purely arbitrary").

Involved here is impairment of Petitioner's fundamentally protected right to liberty.[4] Accordingly, the

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[4] The concept that personal liberty is a fundamental protected right underlies the basic reasoning for the federal habeas statute. In *Lehman v. Lycoming County Children's Services*, 648 F.2d 135 (3d Cir. 1981), the Court recognized that the primary purpose of federal habeas proceedings is to protect a citizen's fundamental right to be free of being wrongfully held in custody. It is the allegation of an unlawful restriction on personal liberties which compels the court to review an otherwise final decision; that is, improper restrictions on personal liberties outweigh the otherwise compelling interest in the finality of litigation. *Id.* at 139.

Commonwealth must establish a compelling reason for its refusal to treat Petitioner similarly to Mr. Scarpone.

The touchstone of due process is protection of the individual against arbitrary action of the government. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 2975 (1974). It is required that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983). A penal statute "must give reasonable notice of the conduct which it proscribes to a person charged with violating its interdiction." *Commonwealth v. Heinbaugh*, 354 A.2d 244, 248 (Pa. 1976).

The facts clearly establish that Appellee has been treated dissimilarly from Mr. Scarpone, based on the evidence and law, and that the Commonwealth has no compelling reason for this difference. Appellee petitioned the

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As Justice Brennan wrote for the Supreme Court majority in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963):

> Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Id. at 424, 83 S.Ct. at 841.

The strength of the protected nature of individual freedom is such that courts even recognize that an individual on parole may be considered "in custody" for purposes of the habeas statute. *See Carafas v. LaVallee*, 391 U.S. 234, 242, 88 S.Ct. 1556, 1561 (1988) (referencing *Jones v. Cunningham*, 371 U.S. 236, 83 S.Ct. 373 (1963)).

Supreme Court of Pennsylvania to exercise its extraordinary powers, no less than three times, so as to afford him treatment equal to that afforded Mr. Scarpone.

Case law, as set forth below, supports Petitioner's contention that he has been denied due process and equal protection of the law of Pennsylvania. In *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), the Court was faced with a factual situation similar to the one at bar; on a writ of *coram nobis*, it was asked retroactively to apply a Supreme Court decision to a prior conviction. In deciding to grant the writ, the *Travers* Court looked to its earlier decision in *United States v. Liguori*, 438 F.2d 663 (2d Cir. 1971), and determined that its decision was based on "the simple and universal rule that a judgement in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law" and that this is "the worst type of fundamental unfairness," requiring the invalidation of the convictions that had become final. *Liguori*, 438 F.2d at 669.

Similarly, in *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298 (1974), the Court stated that if the habeas petitioner's contentions were true that his "conviction and punishment [were] for an act that the law [did] not make criminal," there could be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances that justify collateral relief under [the habeas statute]." *Davis*, 417 U.S. at 346, 94 S.Ct. at 2305.

In *Davis* the petitioner was prosecuted and convicted for failure to report for military induction. In that case, the selective service board had declared him a delinquent and ordered the petitioner to report for induction, even though he had not been found acceptable for military service prior to that time. On direct appeal, the petitioner challenged the local board's application of various military regulations by which they ordered him to report for induction prior to having been found acceptable for service in the Armed Forces. While that appeal was pending, the Supreme Court of the United States announced its decision in *Gutknecht v. United States*, 396 U.S. 295, 90 S.Ct. 506 (1970), wherein it concluded that selective service regulations that accelerated the induction of delinquent registrants were punitive in nature and without legislative sanction. Accordingly, the appeals court remanded Davis's case back to the trial court for further review based on *Gutknecht*. Thereafter, the trial court determined that Davis's induction had not been accelerated because of his delinquency status.

While Davis's second appeal was pending, the Ninth Circuit decided *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), which had facts virtually identical to those in *Davis*, including the trial court's decision that Fox's induction order was not accelerated by the duration of delinquency. On appeal, the Ninth circuit reversed Fox's conviction on the authority of *Gutknecht*. The court of appeals affirmed Davis's conviction and he commenced serving his sentence.

Davis subsequently filed a *habeas corpus* action in which he asserted that the *Fox* case had effected a change

in the law and that its holding required that his conviction be set aside. The court of appeals determined that its decision on direct appeal was the law of the case and that its intervening decision in *Fox* would not be applied in a collateral attack on Davis's conviction. The Supreme Court granted certiorari and ruled that Davis could raise this issue by way of collateral attack, even though it was a matter of statutory construction, because the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and presented "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Davis*, 417 U.S. at 346, 94 S.Ct. at 2305 (citation omitted).

Finally, based on the facts in *Davis*, which are essentially the same as in the instant case, the Supreme Court concluded:

> In this case, the petitioner's contention is that the decision in *Gutknecht v. United States*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* case after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis's conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255.

117 U.S. at 346-47, 94 S.Ct. at 2305 (internal citations omitted).

Here, as in *Davis*, Appellee Fiore is incarcerated for actions that are not criminal, as determined by the highest court of Pennsylvania. This situation clearly constitutes an egregious miscarriage of justice, which violates Petitioner's rights to due process and the equal application of the law. Further, it constitutes a situation cognizable under the habeas corpus statute.

D. EXHAUSTION OF DUE PROCESS/EQUAL PROTECTION CLAIM

A habeas petitioner bears the burden of proving that he has exhausted available state remedies. *Santana v. Fenton*, 685 F.2d 71, 73 (3d Cir. 1982). To demonstrate compliance, the petitioner must show that the claim he asserts in federal court has been "fairly presented" to the state courts. *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971); *Ross v. Petsock*, 868 F.2d 639, 641 (3d Cir. 1989). As previously set forth, Appellee diligently petitioned the courts of Pennsylvania to grant him the benefit of the Supreme Court's decision in *Scarpone*. In state court proceedings, the Commonwealth contended that the issue Appellee raised on direct appeal, stated as an insufficiency of the evidence argument, was not the same argument made by Scarpone on direct appeal. Scarpone's direct appeal was stated in terms of the commonwealth's failure to follow administrative procedure to revoke the permit.

To the extent the Commonwealth raises this contention here, Appellee suggests that this is a distinction without a difference. In fact, the Pennsylvania Supreme Court disregarded this difference in approach, and

granted allocatur precisely because of the existence of two opposing decisions by the intermediate appellate courts. (Ex. 2). In its PCRA Opinion, the Court of Common Pleas disregarded the Commonwealth's attempted detour. By way of a PCRA petition, Appellee requested the state courts to afford him retroactive effect to the *Scarpone* decision, alleging failure to do so would violate his right to due process and equal protection. The Post-conviction court's ruling which denied petitioner retroactive application of the Supreme Court's *Scarpone* decision was based entirely on its conclusion that Appellee had no right to the benefit of a "new rule of law in any matter on collateral review unless the decision was handed down during the pendency of the [petitioner's] direct appeal." (Supp'l. App. at 23).

In denying Appellee's appeal from the post-conviction court, the Superior Court noted that Appellee, there appellant, had litigated (exhausted) the primary issue raised in his post-conviction petition, that he was unfairly convicted and sentenced for conduct which did not constitute a crime. (App. at 139a)

E. RETROACTIVE APPLICATION OF *SCARPONE* DECISION

The principal of nonretroactivity prevents a federal court from granting collateral relief to a state prisoner based on a new rule of law announced after the prisoner's conviction and sentence became final. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 114 S.Ct. 948, 953 (1994) (citing *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 1139 (1992)).

In 1989, the Supreme Court decided *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989), in which it clarified how the question of retroactivity should be resolved for cases on collateral review. *Teague* involved a collateral challenge to the conviction of a black defendant by an all-white Illinois jury after the prosecutor used his ten peremptory challenges to strike blacks from the jury. Petitioner filed a writ of habeas corpus and asked the Court to extend the Sixth Amendment's fair cross-section requirement to petit juries. A plurality of the Court refused to reach the merits, holding that new rules of law should not be applied retroactively on collateral review. "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S.Ct. at 1075 (footnote omitted).

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070. Thus to determine whether a ruling is "new," this Court must "determine whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the constitution." *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260 (1990).

It can be argued that this Court need not deal with the issue of retroactivity, because Appellee and his Co-defendant were simultaneously tried on the same facts, to the same jury, which addressed the same question. However, if this Court does apply a retroactivity analysis, it

must first determine if Appellee is seeking the application of "new" rule. Even if the Court determines that the Appellee seeks the benefit of a new rule, the Court must decide whether that rule falls within one of the two narrow exceptions to the non-retroactivity principle. *See, Gilmore v. Taylor*, 508 U.S. 333, 113 S.Ct. 2112, 2113 (1993).

The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U.S. at 307, 109 S.Ct. at 1073 (plurality opinion) (internal quotation marks omitted). The second exception permits the retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *See, Saffle v. Parks*, 494 U.S. at 495, 110 S.Ct. at 1264. This second exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *United States ex rel. Cannon v. Johnson*, 396 F.Supp. 1362, 1364 (E.D. Pa. 1975), aff'd, 536 F.2d 1013 (3d Cir. 1976).

In determining whether the Supreme Court in *Scarpone* had issued a "new rule of law," we begin an analysis by review of that decision. The Court's succinct opinion makes no reference to earlier decisional law contrary to its conclusion. Rather, the decision is simply based on the black letter principal that penal statutes must be strictly construed. The *Scarpone* decision is one of straight forward statutory construction; in no way does it revise or reverse previous case law, nor has the Commonwealth posited such an argument. Moreover, this principal itself is embraced by statute. *See* 1 Pa. Cons. Stat. § 1928(b)(1).

Further, a review of Pennsylvania case law reveals no decisions upon which the Commonwealth could reasonably have relied in prosecuting Appellee under its interpretation of the law. The obvious result reached by the state Supreme Court was first reached by the Commonwealth Court.

The Pennsylvania Supreme Court's decision in *Scarpone* did not establish a "new" rule of law, but rather only interpreted an existing statute. This construction is supported by decisions of the United States Supreme Court. For example, in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), the Supreme Court considered the scope of the mail fraud statute, 18 U.S.C. § 1341, which prohibits the use of mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The Court held that the mail fraud statute applied only to schemes to defraud others of money or property rights; it did not proscribe schemes to defraud citizens of an intangible right to honest and impartial government.[5]

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[5] Petitioners in *McNally* had been charged with devising a scheme to defraud the citizens of Kentucky of their intangible right to have the state's affairs conducted honestly, and to obtain money by means of false pretenses and the concealment of material facts. The jury was instructed to convict if it found either of two schemes to exist. One scheme involved a deprivation of property rights, but the other involved only the deprivation of the intangible right to good government. The Supreme Court reversed the Petitioners' convictions because the jury had not been required to find that the state was defrauded of any money or property in order to convict.

Subsequent to the Supreme Court's decision, various petitions for writ of habeas corpus were filed by individuals previously convicted under the same statute on the basis of "intangible rights." In *United States v. Lovett*, ___ F. Supp. ___ (No. 87-C-8978) (85 CR 284 1988) (Supp'l. App. 28), the habeas corpus petitioner had been convicted on two counts of mail fraud and moved, pursuant to the federal habeas statute, to vacate his conviction and sentence. The basis of his petition was the Supreme Court's *McNally* decision which had been decided subsequent to Lovett's conviction, sentencing and direct appeals.

In responding to the government's argument that the *McNally* decision should not be applied retroactively, the *Lovett* court noted that in *McNally*, the jury instructions allowed a conviction for conduct that was outside the scope of the mail fraud statute. Thus, the Court concluded, the *McNally* decision did not state a new theory of law. Rather, it merely interpreted the law in a way consistent with the terms of the statute.

Other courts have collaterally set aside mail fraud convictions, based on the retroactive application of *McNally*. *See, United States v. Wade*, 672 F.Supp. 864, 875 n.5 (D.Md. 1987). The *Wade* court's reasoning in granting retroactive effect of the *McNally* decision is particularly *apropos:*

> It is entirely settled that there is no federal common law of crimes. That is, criminal conduct does not offend against the federal government unless it violates an Act of Congress. "One may ➔ be subjected to punishment for crime in the

> federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." The federal judiciary therefore "may not create crimes outright or enlarge the reach of enacted crimes." As the Supreme Court stated in *Viereck*, 318 U.S. at 243, "the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving his conduct may seem." In plain English, if petitioners, conduct was not prohibited by [the mail fraud statute], it was not a federal crime.

United States v. Mandel, 672 F. Supp. 864, 873-874 (D.Md. 1987) (citations omitted). Likewise, in Pennsylvania, the courts may not create crimes, but rather are confined to a strict construction of the Criminal Code. *See*, 1 Pa. Cons. Stat. § 1928(b)(1); *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993) (penal provisions of a statute must be strictly construed).

Similarly in the instant case, the Pennsylvania Supreme Court's decision that Mr. Scarpone's [and Appellee's] conduct did not constitute a violation of the criminal charge imposed does not constitute a new rule of law.

The general rule against the retroactive effect of a "new" statement of law generally involves cases where the court establishes new criminal due process rights and/or procedures, such as in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), and *Miranda v. Arizona*, 384 U.S. 436,

86 S.Ct. 1602 (1966).[6] As is apparent, those two decisions drastically changed the face of criminal procedures. The commonly stated reason for denying retroactive effect to such decisions is that prosecutors should be permitted to rely on existing law at the time of trial. Such changes in procedural rules are retroactively applied only if they affect the truth-finding process. Here, however, the Pennsylvania Supreme Court's ruling the *Scarpone* [sic] simply decided which of two conflicting intermediate appellate court rulings, interpreting a discrete statute, was correct and, critically, what are the actual elements of the offense.

The Commonwealth cannot argue that it was surprised by the Supreme Court's decision. Indeed the very issue underlying this scenario, that is whether the permit was repudiated by Appellee's and Mr. Scarpone's actions, was raised during the course of the trial when the Judge was asked to clarify the instructions to the jury.

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[6] A review of the key federal cases in this area reveal the courts have systematically denied retroactive application of new criminal procedural rulings. In *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965), the Court refused to apply the Fourth Amendment exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), retroactively. In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967), the Court held that the right to counsel at line-ups afforded in *Wade v. United States*, 388 U.S. 218, 87 S.Ct. 1926 (1967), was applicable only to line-ups occurring after the date of the *Wade* decision. In *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969), accorded only prospective application to *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), which excluded limits of non-authorized electronic surveillance. Informed consent rule in *Miranda v. Arizona*, not applied retroactively, *see Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966).

If this Court determines that *Scarpone* was a "new rule" then, Appellee contends, this case falls within the first exception to the non-retroactivity rule. That is, the *Scarpone* decision determined that Appellee's primary conduct was beyond criminal sanction and, thus, he is entitled to benefit of that decision.

This exception to the non-retroactivity rule was fully explained in *Mackey v. United States*, 401 U.S. 667, 675, 91 S.Ct. 1160, 1171 (1971), wherein the Court first explained that nonretroactivity, as a general rule, applied to new " 'procedural due process' rules, that is, those applications of the constitution that forbid the government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior." *Id.* at 692, 91 S.Ct. at 1180. However, the *Williams* court explained,

> new "substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing. As I noted above, the Writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose. Moreover, issuance of the writ on substantive due process grounds entails none of the adverse collateral consequences of retrial I have described above [including the prosecutor's reliance in established law]. Thus, the obvious interest in

> freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently substantial to justify applying current notions of substantive due process to petitions for habeas corpus.

401 U.S. at 693, 91 S.Ct. at 1180 (footnotes omitted).

Mackey referred to that Court's earlier decision *United States v. United States Coin & Currency*, 401 U.S. 715, 91 S.Ct. 1041 (1971), in support of this quotation. In *United States Coin & Currency*, the Supreme Court ruled that its earlier decisions that a gambler who was charged with criminal liability for failing to file tax papers could raise a Fifth Amendment defense against self-incrimination. In determining that those earlier cases should be given retroactive effect, the Court noted that they were based on a finding that certain conduct could not constitutionally be held criminal.

Similarly here, Appellee's conduct, as admitted by the Commonwealth, could not be held criminal as was determined by the Pennsylvania Supreme Court in *Scarpone*. Thus, to the extent that the Court determines that the *Scarpone* decision was a "new rule", the facts of this case fall within the first exception to the nonretroactivity principal.

VI. CONCLUSION

In the instant matter, a prisoner is being incarcerated, but without doubt not for the commission of the offense charged. As such, the Writ should be granted in order to remedy this aberrant and unjust situation.

Respectfully submitted,

LIEBER & HAMMER, P.C.

/s/ M. Jean Clickner
James B. Lieber, Esquire
PA I.D. # 21748
M. Jean Clickner, Esquire
PA I.D. # 42738
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

Date: 8-5-97

/s/ M. Jean Clickner
for Harold Gondelman, Esquire
Plowman Spiegel & Lewis, P.C.
Second Floor
The Grant Building
310 Grant Street
Pittsburgh, PA 15219-2204
(412) 471-8521

Date: 8-5-97

CERTIFICATION OF BAR MEMBERSHIP

I, James B. Lieber, hereby certify that I am a member of the Bar of this Court.

/s/ James B. Lieber
James B. Lieber
Counsel for Appellee
William Fiore

I, M. Jean Clickner, hereby certify that I am a member of the Bar of this Court.

/s/ M. Jean Clickner
M. Jean Clickner
Counsel for Appellee
William Fiore

I, Harold Gondelman, hereby certify that I am a member of the Bar of this Court.

/s/ Harold Gondelman
Harold Gondelman
Counsel for Appellee
William Fiore

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief Of Appellee was served this 5th day of August, 1997, upon the following by Federal Express.

Andrea F. McKenna, Esquire
Senior Deputy Attorney General
Appeals and Legal Services Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

/s/ James B. Lieber

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-3288

WILLIAM FIORE

Appellee,

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants

APPELLEE'S PETITION FOR REHEARING

Appeal from the Order entered April 25, 1997, by the Honorable Gary L. Lancaster of the United States District Court, Western District of Pennsylvania, at D.C. NO. 96-CV-01231, granting petition for a writ of habeas corpus

James B. Lieber, Esquire
PA I.D. # 21748
M. Jean Clickner, Esquire
PA I.D. # 42738
Lieber & Hammer, P.C.
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

Counsel for Appellee

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INTRODUCTION

The instant petition is brought pursuant to Federal Rules of Appellate Procedure 35 and 40 and Chapters 8 and 9 of the IOP of the court of Appeals for the Third Circuit, and respectfully requests a rehearing of the above-captioned matter either by the Panel or by this Court *en banc*. This case requires a second review as it involves a question of exceptional importance in that Appellee Fiore has been denied fundamental Due Process.

The requirement that the Commonwealth must prove each element of a crime charged beyond a reasonable doubt is so fundamental to American constitutional jurisprudence that it is often overlooked in the debate of other complicated statutory or constitutional issues. This case is a prime example of such egregious disregard of fundamental constitutional rights.

Appellee William Fiore was convicted of and sentenced on criminal charges of operating a hazardous waste facility without a permit when, in fact, he had a duly-issued permit from the Commonwealth of Pennsylvania. Moreover, his co-defendant and former employee David Scarpone, also convicted of the same offense, was later exonerated by the Supreme Court of Pennsylvania based on the conclusion that the Commonwealth had not proven each element of the crime. The Supreme Court explained:

> [T]o conclude that the alteration constituted the operation of a new facility without a permit is a bald fiction we cannot endorse. . . . We agree with the Commonwealth Court that the statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection. The Commonwealth Court was right in reversing Mr. Scarpone's conviction of operating without a permit when the facility clearly had one [a permit]. Penal provisions of a statute must be strictly construed under 1 Pa.C.S. § 1928(b)(1).

Commonwealth v. Scarpone, 634 A.2d 1109, 1112 (Pa. 1993).

Petitioner Fiore is incarcerated on a conviction for which the Commonwealth failed to prove each essential

element of the crime, a clear violation of the Due Process Clause of the United States Constitution. Moreover, the blatant differential treatment afforded to Mr. Scarpone, is not justifiable under any analysis and, accordingly, constitutes a violation of the Equal Protection clause of the United States Constitution.

DISCUSSION

A. The Panel decision is erroneous as a matter of law in that it failed to afford deference to well-established principal that a conviction which is not based on proof beyond a reasonable doubt of each element of a crime violates the United States Constitution.

In *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364, 90 S.Ct. at 1073.[1] The Court explained:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of

[1] Following *Winship*, the Court later logically ruled that claims of insufficiency of the evidence upon which to base a conviction are cognizable as a due process violation, and are reviewable by writ of habeas corpus. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2790 (1979).

> every fact necessary to constitute the crime with which he is charged.

Id. The statutory section under which Fiore was convicted reads:

> (a) No person . . . shall store, transport, treat, or dispose of hazardous waste within this Commonwealth . . . unless such person . . . has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department (of environmental resources].

35 P.S. § 6018.401(a). The Commonwealth does not dispute that Petitioner Fiore possessed a DER-authorized permit to operate his facility.

In *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975), a habeas corpus decision, the Supreme Court reversed a criminal defendant's conviction of homicide because the trial court had instructed the jury that the defendant carried the burden of proof by preponderance of the evidence that he acted in the heat of passion or sudden provocation to reduce the crime charged from murder to manslaughter. The Supreme Court ruled in this manner because the concept of "heat of passion or sudden provocation" negated, malice aforethought," which was an element of the definition of murder and, therefore, the Due Process Clause prohibited placing a burden of proof on the criminal defendant to negate an element of the crime. This Court determined that the state court had erred in refusing to apply *Winship* retroactively.

Thereafter, in *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339 (1977), the Supreme Court reversed a conviction for murder where the trial court instructed the

jury that the defendant carries the burden of proof "to your satisfaction" that he acted in self-defense. The defendant in *Hankerson* was tried prior to the Supreme court's decision in *Mullaney*. The court determined however that the burden of proof standard articulated in *Winship* and *Mullaney* was **applicable to all persons on direct appeal regardless of the date of trial.** The court reasoned that *Mullaney* did not announce a new law but rather was an application of *Winship*. The Court further noted:

> In *Ivan v. City of New York*, 407 U.S. 203, 204-205, 92 S.Ct. 1951 (1972), this Court addressed the question whether our decision in *In Re Winship*, [ ] holding the reasonable doubt standard applicable to state juvenile proceedings – was to be applied retroactively. The court there said:
>
> > For the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances. [citations omitted].

Hankerson, 432 U.S. at 240, 97 S.Ct. at 2344.

With all due deference, Appellee Fiore suggests that the Panel asked the wrong question when it focused on

the retroactivity of the *Scarpone* decision rather than on the necessary applicability and prospectivity of *In Re Winship* and its progeny.

As the *Scarpone* decision holds, the Pennsylvania statute manifestly sets forth that the absence of a permit is a material element of the offense with which Mr. Fiore was charged and convicted. Moreover, Fiore consistently raised this issue throughout the course of his appeals and petitions in state court and by way of the instant Habeas Corpus Petition.[2] Because Mr. Fiore was tried after the decision in *Winship*, the Pennsylvania courts surely erred in failing to give him the benefit of the *Winship* decision

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[2] Petitioner Fiore argued during his criminal trial and on direct appeal that the fact of his possession of a permit constituted an absolute defense to this crime. That is, the undisputed evidence was clearly insufficient to establish each element of the crime. And, in fact, that is exactly what the Pennsylvania Supreme Court ruled in *Scarpone*.

The Commonwealth admits that he raised and exhausted this issue on direct appeal. Thus, this Court may conclude its analysis at this point.

In its Brief on Appeal, the Commonwealth wrote:

> The issues raised by Fiore on direct appeal were as follows: . . . (5) that the evidence was insufficient to sustain the conviction that Fiore operated a hazardous waste disposal facility without a permit; that the evidence was insufficient to prove that any discharges were made without a permit; . . .
>
> * * *
>
> Fiore then filed a petition for allowance of appeal in the Pennsylvania Supreme Court raising the sufficiency of the evidence claim.

Appellant's Brief at 6-7

which holds that due process prevents his conviction absence proof by the Commonwealth beyond a reasonable doubt of *every element of the crime alleged.*

Petitioner respectfully suggests that the Panel's focus on whether or not *Scarpone* should have been retroactively applied was inaccurate in that *Scarpone* was not a new statement of the law but rather was a ruling based on Pennsylvania statutory law, including the rules of statutory construction which require that penal provisions of a statute must be strictly construed. 1 Pa. Cons. Stat. § 1928(b) (1).[3] The *Scarpone* decision recognizes that the Commonwealth failed to prove each element of the crime charged, a violation of due process.

The situation confronting the Court in this case is remarkably similar to that which it addressed in *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3rd Cir. 1978). In *Hickey*, the criminal defendant was convicted of carrying a firearm without a license. Following the denial of his appeals to the Superior and Supreme Courts of Pennsylvania, Hickey filed a federal habeas corpus petition wherein he contended that the Commonwealth had been unconstitutionally relieved of the burden of proving an essential element of the offense, that being the absence of a license to carry a firearm.

Hickey's trial and conviction occurred subsequent to *Winship*, but prior to the Pennsylvania Supreme Court's decision in *Commonwealth v. McNeil*, 337 A.2d 840 (Pa. 1975), wherein the Court clarified that absence of a

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[3] As the Magistrate Judge accurately recognized, [sic]

license was an essential element of the crime and, pursuant to *Winship*, the Commonwealth carried the burden of establishing that fact. Pennsylvania appellate courts rejected Hickey's challenge to the unlicensed possession of firearms conviction because his trial took place before *McNeil* decision was issued, which the state courts concluded was prospective only.

Upon review of the habeas corpus petition, the Third Circuit Court of Appeals recognized that the Pennsylvania courts had erroneously focused on the retroactivity of *McNeil* rather than the prospective effect of *Winship*. Petitioner respectfully submits that the Panel of this Court has made the same error.

The Pennsylvania Supreme Court's decision in *Scarpone* was hardly a new statement of the criminal law of Pennsylvania, but rather was simply a ruling based on clear, unequivocable, and well established Pennsylvania law. Accordingly, Petitioner's request to the benefit of the *Scarpone* decision is not a request for retroactivity *per se*. Rather, Petitioner references the *Scarpone* decision as support for his consistently held position that the Commonwealth failed to prove each element of the crime of operating a hazardous waste facility without a permit and, accordingly, his conviction and incarceration for that crime violates due process.

Two distinguished Judges of this District have carefully reviewed the record in this matter and reached a conclusion diametrically opposed to that of the Panel herein. District Judge Gary Lancaster of the United States District For the Western District of Pennsylvania,

affirmed the Magistrate Judge's Report and Recommendation wherein Judge Caiazza stated:

> A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 1519 (1994). Accordingly, a conviction under section 606(f) is not valid unless the state satisfactorily establishes that the defendant is operating a waste site without a permit.

Report and Recommendation at 19.

Clearly, the Panel's decision in this matter should be reviewed on the basis of a fundamental breach of Due Process, wherein a decidedly innocent man who was not, could not, and cannot be proven guilty of every element of a crime has been convicted. Historically the writ of habeas corpus has been invoked to correct such injustices, and it should be available in the instant case as the District Court found.

B. Appellee Fiore's conviction constitutes a clear violation of Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to **any person** within its jurisdiction the equal protection of the laws" (emphasis supplied)

As the Supreme Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v.*

Kraemer, 334 U.S. 1, 22, 68 S.Ct. 836, 846 (1948). At bottom, the Equal Protection Clause guarantees that local, state and the federal governments treat similarly situated persons similarly; it restrains arbitrary governmental classifications or treatments which lead to invidious discrimination. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985). The constitutional prohibition extends both to statutes which, on their faces, draw discriminatory classifications, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880), and to statutes which, when applied, lead to discriminatory classifications. *See Yick Wo. v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S. Ct. 2941 (1979).

Not all government-made classifications are proscribed; nor are all government-made classifications reviewed under the same standard. Statutes which purposefully impair a fundamental right, such as the denial of one's freedom of movement, are subject to "strict scrutiny." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973). Under this standard of review, the government-made classification is upheld only if it is found to be necessary to obtain a compelling government objective. Few government-made classifications pass this rigorous test. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 2286 (1972).

Appellee William Fiore and his co-defendant David Scarpone are equally situated in all respects but for the manner by which their cases were appealed through the same state's court system. Scarpone has been exonerated by the Pennsylvania Supreme Court on all charges related to the charge of operating a hazardous waste facility

without a permit. Appellee Fiore, on the other hand, is unjustly incarcerated for precisely that offense. There is absolutely no rational basis for the courts' distinction between Mr. Scarpone and Mr. Fiore resulting in the freedom of one and the lengthy confinement of the other, much less an explanation which would pass the strict scrutiny analysis. The judicial failures to afford Mr. Fiore the same treatment afforded to Mr. Scarpone constitute a mockery of justice, most recently clothed in an incorrect retroactivity analysis. Moreover, this Court's novel linkage of Fiore's equal protection argument (which arises under the federal constitution) to retroactivity is not logically compelling; nor does it have any cognizable basis in statutory or case law.

The unjustified and unequal treatment of Mr. Fiore and Mr. Scarpone was soundly recognized in the Magistrate Judge's Report and Recommendation:

> The merits of this matter present uncommon circumstances: two intermediate appellate courts in Pennsylvania applied the same facts to the same statute and reached opposing conclusions. Based on the opinion of the Court of Common Pleas, the Superior Court concluded that Fiore was properly charged and convicted of operating a waste disposal facility without a permit under section 606(f) of the SWMA. Conversely, the Commonwealth Court determined that Scarpone, Fiore's codefendant, could not be convicted under section 606(f) because the DER had in fact issued a permit to operate the facility.
>
> Additionally, the Supreme Court [of Pennsylvania] was internally inconsistent with its

> respective rulings. In Fiore's appeal, it summarily affirmed the Superior Court by denying allocatur. However, the Supreme Court granted allocatur to Scarpone. It then affirmed the Commonwealth Court with the following analysis.
>
> > We find that the Commonwealth did not make out the crime of operating a waste disposal facility without a permit against Mr. Scarpone under the statute. Simply put, Mr. Scarpone did have a permit.

Report and Recommendation at 14.

CONCLUSION

Appellee Fiore is currently incarcerated on the basis of a conviction which the Commonwealth obtained in violation of the Due Process Clause and the Equal Protection Clause of the United States Constitution. Justice demands that this Court affirm the District Court's Order granting Mr. Fiore relief.

The matters at issue go [sic] the very heart of American jurisprudence. Can an individual who is incontestably innocent of the crime charged nonetheless be punished severely because he is perceived as a "bad man" guilty of something else? Can a state capriciously confine one man and free another for the same noncriminal conduct? Is habeas corpus still the great writ or has it been watered past the point of effectiveness?

These are large questions for this or any court. They and the inconstant rulings by state and federal tribunals as well as the interests of justice militate in favor of a

thorough rehearing and definitive statement by the Court en banc.

Respectfully submitted,

LIEBER & HAMMER, P.C.

/s/ James B. Lieber
James B. Lieber, Esquire
PA I.D. # 21748
M. Jean Clickner, Esquire
PA I.D. # 42738
5528 Walnut Street
Pittsburgh, PA 15232-2312
(412) 687-2231

Date: _____

Local Appellate Rule 35.1 Statement

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional important, [sic] i.e., whether Appellee Fiore is incarcerated in violation of *Winship* and its progeny, which set forth that the Due Process Clause requires that an individual may not be convicted of a crime unless the Commonwealth proves each element of the crime beyond a reasonable doubt and that, in this case, the Commonwealth was improperly relieved of that Constitutional obligation. Moreover, if let stand, Appellee Fiore's conviction and incarceration on the charge of operating a hazardous waste facility without a permit constitutes a gross and indefensible breach of Equal Protection.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Petition for Rehearing was served this 3 day of August, 1998, upon the following by Federal Express.

Michael Fisher, Esquire
Attorney General for Pennsylvania
Office of the Attorney General
Strawberry Square
Harrisburg, PA 17128

/s/ James B. Lieber